Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness

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Can constructs of social meaning lead to actual criminal confinement?[1] Can the intangible value ascribed to the maintenance of certain social norms lead to radically inefficient choices about resource allocation? The disproportionate criminal confinement of people with severe mental illnesses[2] relative to non-mentally ill individuals, adjusting for differences in lawbreaking conduct between the two groups, suggests that social meanings related to mental illness can create legal and physical walls around this disfavored group. Responding to problems of mental illness principally through the criminal system imposes billions of dollars in costs annually on the public,[3] above any offsetting benefit in public safety and deterrence, and imposes terrible human costs on people who suffer from these illnesses.[4]

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[1] For a working definition of "social meaning," see Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 681 (1998) (defining "'social meaning'" as "what that [an] act, omission, or status means to a community of interpreters").

[2] See note 23, *infra*, setting forth the definition of mental illness for purposes of this Article.

[3] See Section II.B.1, *infra*, estimating that the annual incarceration costs alone of nonviolent and nonoffending adults and children are approximately $5.95 billion dollars. This estimate does not include other direct costs of involvement in the criminal justice system.

[4] These costs have been noted by a plethora of federal and state task forces and committees. *See* COMMITTEE ON GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN THE UNITED STATES (2004) (hereinafter "HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH"); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2003 (May 2004) (hereinafter, "BUREAU OF JUSTICE STATISTICS, 2003 REPORT") (reporting extensively also on mentally ill individuals in prisons and jails); Exec. Order No. 13263, 3 C.F.R. 233 (2003), *reprinted in* 67 Fed. Reg. 22337 (May 3, 2002) (Order of President George W. Bush, establishing the President's New Freedom Commission on Mental Health); COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT (2002); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999) (hereinafter, BUREAU OF JUSTICE

Yet, the criminal confinement regime may create intangible social value by reinforcing norms related to personal responsibility, based on the current and historical social meaning of mental illness. Social meaning is an essential term in the economic analysis of law, a central insight of the New Chicago School of law and economics.[5] Reform efforts aimed at replacing the current punitive paradigm with a medical or therapeutic model founder because they fail to account for the social meanings that maintain the punitive paradigm and for the social value it creates. Understanding the social meanings of mental illness and how they intersect with the norm-enforcing role of the criminal law can lead to normatively literate reform proposals, liberating tremendous economic and human value.

It is beyond cavil that the criminal justice system functions as the United States' default asylum system. For every one person treated for a psychiatric illness in a hospital, about five people with such conditions are treated, or confined without treatment, in penal facilities. Many people with mental illnesses confined in prisons and jails have committed no offense at all or merely a public order infraction: Statistics show that between 30 and 40 percent of mentally ill individuals in the jails of certain states had no criminal charges pending against them, while jails report frequently holding people with mental illnesses simply because there is no other place to put them. Criminal confinement principally or exclusively because of mental illness affects U.S. children as well.

The confinement of adults and children with mental illnesses in penal facilities comes at an extraordinarily high cost to the U.S. economy. The direct costs include the costs of involvement in the criminal justice system from arrest through incarceration and release, while

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STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES"); UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999). The findings of each of the works cited here is discussed *infra*.

[5] Although this term was coined by Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998), work in this area has been advanced by many scholars.

the indirect costs include lost productivity resulting from untreated or undertreated mental illness and from incarceration, as well as the lost productivity of the family members or other intimates who provide unpaid care for a person with a mental illness. Economists and legal scholars have not attempted to calculate the total direct and indirect cost to the economy of a public order response to mental illness. This Article attempts to estimate from existing data sources the direct cost of the public order response. It also separates out the costs attributable to the use of the criminal system for nonviolent and nonoffending people with mental illnesses from those attributable to violent offenders.

Yet, to say something is costly says nothing about its worth. Even a massive expenditure can be valuable if the benefits are similarly great. In classical economic terms, incarceration expenditures can be considered net positive, and rational, if the value they produce in the form of deterrence and public safety exceeds the costs. Yet, a substantial portion of the costs incurred as a result of the public order response to people with mental illnesses produces no deterrence or public safety benefits. General deterrence (the notion that potential lawbreakers are dissuaded from their intended crime when they see others have been locked up for the same thing) and specific deterrence (the prevention of a particular person committing his or her intended crime) certainly cannot be promoted by incarcerating people who have not committed a crime. Similarly, public safety is not advanced by confining people who are nonoffending or whose offenses of conviction are nonviolent. Even as to violent mentally ill lawbreakers, public safety may be better served by detention in secure hospitals, as many prison systems transfer their violent mentally ill inmates to hospitals in any event.[6] The lack of value in the criminal response to mental illness is further thrown into relief by various states' pilot programs offering less

[6] See note 59, *infra*, and accompanying text.

expensive, more effective non-criminal alternatives. Yet, these programs are perpetually starved of funding.

This presents a stark conundrum: Why do governmental units choose to spend billions of dollars a year to concentrate people with serious illnesses in a system designed to punish intentional lawbreaking, when doing so matches neither the putative purposes of that system nor most effectively addresses the issues posed by that population? This set of contradictions is all the more puzzling for the extent to which it is generally not remarked upon or challenged. For if there is serious discussion in the academy at all about the truly vast interrelationship of mental illness and the criminal justice system, it centers on the interesting but empirically trivial insanity defense,[7] which is supposed to exclude people with mental illnesses from criminal punishment under certain circumstances, not on the paradoxes of why the criminal system is in fact the system of choice for dealing with people with these illnesses.[8]

This Article suggests that the tremendous economic and human costs of the public order response to mental illness not only are unquestioned by scholars but actively embraced lawmakers and voters because of the prevailing social meaning of mental illness. The New Chicago School of law and economics posits that social meaning (which is what an "act,

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[7] "Rivers of ink, mountains of printer's lead, forests of paper have been expended on [debating the insanity defense]" over the last century. Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S.CAL. L. REV. 514, 516 (1968). A small sample of key works on the insanity defense includes: HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE (1967); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"— Why Not?*, 72 YALE L.J. 853 (1963).

[8] The extent of the involvement of people with mental illnesses in the criminal justice system has been written on by few legal academics, but most extensively by Michael Perlin; however, Perlin's focus remains on the insanity defense. *See, e.g.*, Michael Perlin, *'The Borderline Which Separated You From Me': The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375 (1997); *Psychodynamics and the Insanity Defense: 'Ordinary Common Sense' and Heuristic Reasoning*, 69 Nebraska L. Rev. 3 (1990). A literature review reveals neither any institutional analysis of the public order response to problems of mental health nor any law and economics analysis of this institutional preference.

omission, or status means to a community of interpreters"[9]) creates social value, and that social value is an essential term in the economic analysis of law. This Article contends that the social meanings of mental illness at play in U.S. culture are the "moral/punitive" model, which is dominant, and the "medical/therapeutic," which is subordinate.

Under the moral/punitive model, mental illness is conceived of as a failure of responsibility, not as a set of medical conditions that require and respond to treatment. Social value is created through a criminal justice response to mental illness because, under current ways of thinking about mental illness, the punishment of people with mental illnesses is believed to reinforce the core norm of individual responsibility. Punishment of people with mental illnesses dovetails with our beliefs about the appropriate role of the criminal system in punishing culpable failures of responsibility and of prison as the place for people who violate not only the law but core social norms.

Support for this claim is abundant: The notion that mental illness should not be treated but policed as a failure of responsibility, and that that reinforces the norm of individual responsibility, finds expression in legal scholarship, among mock and actual juries, in legislation and in the statements of lawmakers. The unacceptability of hospital-based confinement as a potential "alternative sanction" also attests to the primacy of the moral/punitive model over the medical/therapeutic. Further, the contrast between the criminal disposition of people with mental illnesses and the excuse of "temporary insanity" highlights the role that the specific social meaning of mental illness plays in relation to the norm of individual responsibility. This defense applies only to non-mentally ill actors who break the law as a result of certain "provocative" circumstances (originally, catching a spouse in adultery, although the circumstances deemed sufficiently provocative are historically and culturally contingent). This shows that the law

[9] Lawrence Lessig, *The New Chicago School*, 27 J. J. LEGAL STUD. 661, 681 (1998).

excuses lapses that are construed as virtuous but not those that are seen as culpable, or simply alien.

Like mental illness, the institution of prison also has a particular social meaning. An extensive body of scholarship on the history of the prison suggests that prison not only confines but signifies society's disgust toward those who transgress against valued norms, including against the norm of individual responsibility. This meaning of the prison in addition to confinement (for secure hospitals can also confine) points to utility created by the incarceration even of nonviolent and nonoffending people with mental illnesses—so long as mental illness is conceived of under a moral/punitive paradigm. But if mental illness were conceived of under a medical/therapeutic model, the confluence between the meanings of mental illness and of prison would disappear. This would liberate tremendous economic and human value and require the location of people with mental illnesses in a different, treatment-based system.

My argument proceeds in four parts. Part I introduces New Chicago School scholarship and the rise of the importance of social meaning in the economic analysis of law. It then posits the existence of some positive social value created by the public order response to mental illness that accounts for the resilience of that regime.

Part II presents the use of corrections facilities as confinement centers for people with mental illnesses, the tremendous associated costs, and the absence of offsetting gains in deterrence or public safety. Section II.A presents statistics from the state and federal prison systems, including jails and juvenile corrections facilities, to show that the criminal justice system in fact serves as the default system for hundreds of thousands of adults and children with mental illnesses. Section II.B estimates the costs associated with using the criminal system specifically to confine nonviolent and nonoffending people with mental illnesses and evaluates

the extent to which there may be offsetting deterrence or public safety gains. It concludes that, in classical economic terms, the use of the criminal system is irrational because the massive costs to confine nonviolent and nonoffending adults and children are not offset by the traditional benefits; further, it presents some evidence that public health alternatives are cost-effective but disfavored.

Part III supports the claim that the dominant model of mental illness is the moral/punitive one and for the related claim that, under a moral/punitive paradigm, social utility is created through the instrumental punishment of people with such illnesses. Of course, mental illness has a complex social existence and this Article does not purport to discern all of its meanings. Yet, there is substantial support in contemporary and historical legal, academic, and popular sources for the claim that the moral/punitive and medical/therapeutic conceptions of mental illness are the major social meanings of mental illness, and that the dominance of the moral/punitive model is linked to the maintenance of norms of individual responsibility. Section III.A.1 looks at responsibility rhetoric among scholars, lawmakers and community members. Section III.A.2 considers the counterpoint between excuses for people with actual mental illnesses and the "temporary insanity" excuse for non-mentally ill people who break the law in ways consistent with prevailing norms. Section III.B turns to the literature on alternative sanctions to examine the failure of hospital-based confinement as an alternative to prison for people with mental illnesses.

Part IV examines the meaning of the institution of the prison in relation to the mentally ill. Tracing the historical interrelationship of the confinement of the "mad" and the development of the prison, it shows that the punitive confinement of people with mental illnesses has occurred throughout Western history as a method of enforcing not only actual order but of signaling

commitments to social order. The use of the mentally ill as the ultimate symbolic subjects of penal correction extends even to the linguistic: In German, a term for people with mental illnesses in use through the mid-20th century was "*unzucht*"—those who are out of "order"—while the contemporaneous term for prison was "*zuchthaus*"—the house of order, or that restores order. Unsurprisingly, long before Western society adopted prison as the punishment for all sorts of legal transgressions, the original occupants in all Western countries of "houses of correction" were the mentally ill.

The Article closes with prescriptions for future directions. If we believe that social institutions match and reinforce social meanings, then it is the intersection of the cultural perception of the mentally ill as culpably deviating from valued norms, and of the criminal system as appropriate to reinforcing norms of responsibility and of order that leads to the localization of the mentally ill in the criminal system. As Lawrence Lessig describes in his work on "meaning architects," changes in systems flow from changes in meanings.[10]

I. Social Meaning the Economic Analysis of the Law.

Following the work of "New Chicago School" theorists on the relationship between social meaning and the economic analysis of the law, this Article will argue that, because the dominant social meanings of mental illness arise under a punitive paradigm, instead of a therapeutic paradigm, reform efforts aimed at substituting treatment for incarceration will fail. Liberating the huge economic value that could result from moving away from the punitive model toward a treatment-based model will depend on a shift in the social meanings associated with these diseases.

[10] Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 43-45 (1995) (introducing concept of "meaning managers" or "meaning architects").

Social meaning is an essential term in the economic analysis of law — a central insight of the so-called "New Chicago School" of law and economics.[11] Elucidating the relationship between classical economic analysis of law and social meaning, scholars proceeding in this school posit that laws and policies that are rational under classical economic theory often may fail because they do not account for the social meanings of the practices that they attempt to influence. Laws that fail to account properly for the *social* costs and incentives may influence members of the community to defy the legal regime, while those that are consonant with the relevant social meanings at issue may be more likely to achieve compliance.

The "social meaning turn" in legal scholarship aims to expand economic analysis to account for real, yet often unaccounted for, costs that community members incur and benefits they derive from their actions.[12] Rather than rejecting economic analysis, or arguing that much human behavior is not susceptible to economic analysis because it is part of the unquantifiable world of the emotional or social, it investigates the social meaning of the practice at issue, and the associated social costs and benefits of deviating from the norms related to that practice.[13]

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[11] Lessig, *The New Chicago School*, supra note 1, at 661-63, 673 (1998) (defining and discussing the "new" Chicago school). The influence of norm theorists has spread to almost every area of legal studies. *See, e.g.*, *id*. at 673 & n.39; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 373-89 (1997); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996); Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996) (including work by Eric Posner, Lisa Bernstein, David Chamy, Jason Scott Johnston, Edward B. Rock, Walter Kamiat, Richard H. McAdams, Wendy J. Gordon, and Richard Delgado).

[12] Kahan, *supra* note 11, at 394-95; Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 978-79 (2000) (describing, and offering criticisms of, efforts to incorporate normative reasoning about the law, and behavioral economics, into classic economic analysis of the law).

[13] Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 610 (1998) (critique of economic analyses of law that fail to incorporate social costs is "internal to economic analysis").

Those social costs and benefits then are built into a more robust account of how a rational individual, operating within a specific social context, is likely to act.[14]

Deviation from a norm imposes a cost as a result of the meanings that other community members ascribe to deviation and the penalty (however indirect) assessed therefor.[15] As Lessig explains, the cost "of deviating from a social norm is . . . a price, associated with a given action . . . . [O]ne only understands that price by interpreting the action consistent with a norm, or the action deviating from this norm, in its context."[16] To determine the costs of norm deviation, or to understand what levers may be used to change a norm, its social meaning thus must be understood. Departing from valued social norms may cause an actor to incur substantial social costs—thus, where the penalty for breaking (or incentive for conforming to) a law does not outweigh the social benefits or costs of behaving consistently with extant norms, the actor who is maximizing his or her long-term utility within a specific social context should choose to break the law.[17] Conversely, an incentive or penalty scheme that harnesses the social meanings at issue in the practice that is its target are more likely to gain compliance, and may alter the social meaning of the practice itself.[18]

The insights developed in this body of scholarship point to an explanation for the persistence of the apparently inefficient regime of incarcerating non-offending and nonviolent people with mental illnesses: That a form of social value is created through the public order response to people with mental illnesses. Specifically, the public order response to issues

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[14] *Id.*

[15] *Id.*

[16] Lessig, *The New Chicago School*, *supra* note 1, at 680-81.

[17] Sunstein, *supra* note 11, at 2024-25.

[18] *Id.* (exploring "how legal 'statements' might be designed to change social norms").

presented by people with mental illnesses, rather than a public health response, may relate to social meanings of mental illness that construct mental illness as a culpable failure of responsibility.

Because the criminal system reinforces personal and social responsibility, and punishes deviance, social meanings that construct the mentally ill as *culpably* irresponsible could create social value by reinforcing the responsibility norm, at relatively low social cost, against a disfavored outgroup. Although otherwise inefficient on its face, the criminal system thus becomes the "expressively" logical location for people with mental illnesses, once relevant social meanings of mental illness are taken into account. The path toward substituting a public order response for a public health response then becomes clear: Initiatives to relocate the treatment of people with mental illnesses from the criminal system to the health care system, and to refocus the social response from the punitive to the therapeutic, only will succeed if they also ambiguate or change the predominant social meaning of mental illness from a failure of morality or responsibility to a medicalized conception.

Any initiative to substitute treatment for punishment that does not first change or ambiguate the social meanings of mental illness will affront the valued social meanings of personal responsibility that are policed by the criminal system.[19] As Kahan has argued, legal regimes and policies that are economically rational but that run counter to a dominant social meaning about the practice at issue will be "politically stillborn" because the narrowly efficient alternative has failed to account for the social meaning, or the "work," that the entrenched

[19] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1863 (2000) (arguing that "[c]riminal law's influence comes from its operation as a societal mechanism through which the force of social norms is realized and by which the force of internal moral principles is strengthened.").

regime performs in maintaining certain social meanings.[20] In fact, this has been the case: There is a long history of well-intentioned reform efforts aimed at changing the response to people with mental illnesses from punitive to therapeutic that have foundered on social meaning.[21] Conversely, legislative efforts that support the incarceration of people with mental illnesses, but in fact offer little or no gains in public safety, nevertheless win substantial support.[22]

II. Uses of Corrections Facilities as Confinement Centers for People with Mental Illnesses and Associated Costs.

> *"It is deplorable and outrageous that . . . prisons appear to have become a repository for a great number of mentally ill citizens. Persons who, with psychiatric care, could fit well into society, are instead locked away, to become wards of the state's penal system. Then, in a tragically ironic twist, they may be confined in conditions that nurture, rather than abate, their psychoses."*
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> — Judge William Wayne Justice, *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Texas, 1999).

A. Incarceration and "Criminalization" of People With Mental Illnesses.

Nationwide, there are far more severely mentally ill individuals confined in prisons and jails than treated in all mental health facilities collectively. Annually, over three hundred thousand adults and children with mental illnesses[23]—many of whom have committed only a

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[20] Kahan, *Social Meaning and the Economic Analysis of Crime*, *supra* note 13, at 617 (describing the repeated failures of movements to substitute alternative sanctions for incarceration due to the failure of alternative sanctions to communicate the unequivocal condemnation of law-breaking signaled by incarceration).

[21] Much scholarship has been performed on the cultural history of mental illness and of different efforts aimed at reforming the treatment of people with such diseases in Europe and the United States. This Article will not recapitulate this extensive history but draws on it illustratively to demonstrate the failures therapeutically-motivated reform efforts. For two excellent overviews, see ROY PORTER, MADMEN: A SOCIAL HISTORY OF MADMEN, MAD DOCTORS, AND LUNATICS (2004); THE CONFINEMENT OF THE INSANE: INTERNATIONAL PERSPECTIVES (Roy Porter & David Wright eds.) (2003).

[22] *See infra*, notes 116-123 and accompanying text (discussing state and federal limitation or elimination of the insanity defense); notes 134-138, and accompanying text (discussing New York criminal involuntary commitment statute).

[23] The terms "mental illness" or "mental illnesses" cover a diverse collection of diseases that range in severity and vary in their causes, symptoms, and treatments. This Article focuses exclusively on severe mental illnesses such as schizophrenia and bipolar disorder. These diseases are considered "severe" because, if untreated, they substantially

public order infraction or no offense at all—are confined in state and federal prisons, jails, and juvenile corrections facilities.[24] A mere sixty thousand people with such conditions are treated annually in medical facilities.[25] Thus, for every one person treated in a hospital, about five people are treated, or merely confined, in penal facilities.[26]

Prisons have become the largest mental health facilities in the United States. For example, the Los Angeles County Jail holds up to 3,300 people with mental illnesses per day, more than any state hospital or mental health facility in the United States.[27] Similarly, New York's Rikers Island jail complex holds about 3,000 mentally ill inmates each day, making it

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impair daily life functioning (*i.e.*, basic self-care) and most major life activities (*e.g.*, the ability to hold a job). Sufferers require ongoing psychiatric treatment and supportive services in order to function in the community. This definition of mental illness is consistent with those used by the studies on which this Article relies for its statistics, ensuring, to the greatest extent possible, "apples to apples" comparison across sources. *See, e.g.*, COUNCIL OF STATE GOVERNMENTS, *supra* note 4, at 11 (referencing U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 4-5, 46 (1999)); T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, n.20 (1997); E. FULLER TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 15 (1992); CORRECTIONAL ASSOC. OF N.Y. AND THE URBAN JUSTICE CENTER, PRISONS AND JAILS—HOSPITALS OF LAST RESORT: THE NEED FOR DIVERSION AND DISCHARGE PLANNING FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS IN NEW YORK at 6 & n.3. (1999) (hereinafter "CORRECTIONAL ASSOC. OF N.Y."). These disorders qualify as the "major psychoses" under the DSM-IV, the standard nomenclature of mental illness used by health practitioners published by the American Psychiatric Association. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

[24] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 3 (reporting 284,000 incarcerated people with mental illnesses; further reporting 548,000 on probation). Figures for 2003 can be extrapolated from the 2003 Bureau of Justice Statistics census of prisons and jails. The Bureau of Justice Statistics reports that approximately sixteen percent of all people incarcerated in state prisons (16.2%) and jails (16.3%), and approximately seven percent (7.4%) of inmates in federal prisons, have a mental illness as defined in this Article. *Id.* at 1. For 2003, the Bureau of Justice Statistics reports that 1,380,776 people were confined in state prisons and local jails, and 691,301 people were confined in federal prisons. BUREAU OF JUSTICE STATISTICS, 2003 REPORT, *supra* note 4, at 2, Tab 1 (May 2004). Applying the percentages in the Bureau's report on the prevalence of mental illness in prisons and jails, *supra*, to the totals reported on the 2003 mid-year report, in 2003 there were approximately 197,883 people with mental illnesses in state prison, 112,682 in jails, and 11,786 in federal prisons, or a total of 322,352.

[25] Michael Winerip, *Bedlam on the Streets*, N.Y. TIMES, May 23, 1999, at Sec. 6, Page 42, (reporting 61,700 people with mental illnesses treated annually in in-patient mental health facilities).

[26] *Id.*

[27] COUNCIL OF STATE GOVERNMENTS, *supra* note 4, at 6 (citing *Treatment Not Jail: A Plan to Re-build Community Mental Health*, SACRAMENTO BEE, B6 (Mar. 17, 1999)).

"the state's largest psychiatric facility."[28] The 2000 Census of state and federal prisons reports that the "primary . . . or secondary function" of over 150 prisons nationwide is "mental health confinement."[29]

The extraordinary proportion of people with mental illnesses confined in criminal facilities versus treated in medical facilities does not stem from their higher rate of criminality. Federal and state statistics show that people with mental illnesses do not engage in more unlawful conduct than people who do not have such illnesses.[30] Rather, features of community and law enforcement responses to people with mental illnesses and the absence of a viable public health alternatives, cause them to be "significantly overrepresented in the criminal justice system."[31] Government studies find that "[m]ost of these individuals have committed only minor infractions, more often the manifestation of their illness than the result of criminal intent,"[32] nuisance offenses such as disturbing the peace, intoxication, and fare-beating.[33]

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[28] Winerip, *Bedlam*, *supra* note 25.

[29] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH TREATMENT IN STATE PRISONS 4 (2000). It also is worth noting that although incarceration may exacerbate the illnesses of prison inmates, it is not causing the prevalence of mental illnesses found in them. Most mentally ill individuals in the prison system have received a diagnosis of mental illness prior to admission to criminal detention. CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 13. A 1997 HHC Office of Correctional Health Services study found that 68% of inmates had had contact with the mental health system prior to incarceration. *Id.* at 13, n.61.

[30] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 9 (presenting statistics for federal and state systems).

[31] COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT: PROJECT OVERVIEW 2 (2002) (hereinafter, COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW).

[32] National Association of Counties, *Fact Sheet: Diverting the Mentally Ill From Jail* (Feb. 2004) (nationwide study of counties, referring to the 160,000 people with mental illnesses held in county prisons and jails). *See also* BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 9 (finding that approximately half of mentally ill inmates in state prisons had been convicted of nonviolent offenses).

[33] CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 7 & n.13. *See also* Patricia G. Bames, *Safer Streets at What Cost?*, 84 A.B.A. J. 25 (1998) (reporting results from Texas that about 63% of repeat public order, or "quality of life," offenders are homeless), *quoting Broken Windows & Broken Lives: Addressing Public Order Offending in Austin* (Center for Criminology and Criminal Justice Research at the University of Texas at Austin).

In fact, many jailed adults with mental illnesses have not been charged with any unlawful conduct. Rather, jails frequently hold people with mental illnesses because there is no other place to accommodate them.[34] In a survey of jails nationwide, thirty percent reported incarcerating mentally ill people with no charges against them.[35] Although under constitutional *habeas corpus* protections it is unlawful for the state to criminally detain an individual without charge, several states have enacted legislation under their police power specifically to permit the jailing of mentally ill individuals without charges.[36] Officials in other states engage in the same practice absent specific authorizing legislation.[37] In South Carolina, according to one study, over forty percent of mentally ill men and women incarcerated in jails had no criminal charges pending against them.[38] In Louisiana, the same finding has been made as to nearly thirty percent of the state's severely mentally ill jail inmates.[39]

These statistics may understate the number of people incarcerated because of mental illness.[40] Law enforcement officers across the country have reported that they "invent" charges

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[34] Stone, *supra* note 23, at 291; TORREY ET AL., *supra* note 23, at 43.

[35] TORREY ET AL., *supra* note 23, at 44 (citing study by the National Association for the Mentally Ill (NAMI) and the Public Citizen's Health Research Group) (29 percent, or 403, of the jails reported this practice).

[36] *See* Colo. Rev. Stat. Ann. § 27-10-105(1.1) (West 1994); Neb. Rev. Stat. § 83-1020(3) (1994); Tex. Health & Safety Code Ann. § 573.001(e) (West 1992); Va. Code Ann. § 37.1-73 (Michie 1994).

[37] TORREY ET AL., *supra* note 23, at 44. States with the highest percentage of jails reporting that they confine people with mental illnesses without charges include South Carolina (41% of jails reporting holding uncharged people with mental illnesses), Louisiana (28%), and Washington (25%). *Id.*

[38] *Id.*

[39] *Id.* The figure for Louisiana is 28%. *Id.*

[40] Linda A. Teplin, *Policing the Mentally Ill: Styles, Strategies, and Implications*, *in* JAIL DIVERSION FOR THE MENTALLY ILL 10, 12-14 (Henry J. Steadman ed., 1990) (suggesting that many severely mentally ill are arrested because the police view a mental health referral as unavailable). For a discussion of "mercy arrests," see also HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 21, n.35 (2003).

against mentally ill individuals in order to bring them into jails.[41] A West Virginia jail official, for example, reported that he believed a local psychiatric hospital releases its patients "too easily."[42] To correct the hospital's "mistakes," he reported inventing charges on which to detain mentally ill individuals.[43]

Through a combination of increased likelihood of arrest, re-arrest, and detention without charge or on spurious charges, people with mental illnesses are significantly more likely than other people to spend time in criminal confinement without having committed more lawbreaking acts.[44] According to Senate testimony, "up to 40 percent of adults who suffer from a serious mental illness will come into contact with the . . . criminal justice system at some point in their lives," often "unnecessarily."[45]

Criminal confinement because of mental illness affects U.S. children as well. In July 2004, the House Committee on Government Reform issued a study[46] thatfound, across the

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[41] Stone, *supra* note 23, at 292-94. Stone states that "many persons with mental disorders are charged with misdemeanors or other minor offenses just to get them off the streets and as a means of obtaining mental health treatment that is not available in a civil, as opposed to a criminal, setting." *Id*. at 292-93. For example, a Florida jail director reported "routinely" holding uncharged mentally ill individuals for "up to six weeks" in paper gowns because of the lack of available hospital beds. TORREY ET AL., *supra* note 23, at 45; *see also* Stone, *supra*, at 294. Similarly, an Arizona sheriff reported fabricating charges repeatedly to jail a severely mentally ill homeless woman. TORREY, *supra*, at 47.

[42] TORREY ET AL., *supra* note 23, at 47.

[43] *Id.* (quoting sheriff stating, ""[I]f the mental institutions will not hold them, I will.").

[44] Women with a serious mental illness are six times more likely to be incarcerated than women without such diseases, while men with such illnesses are four times more likely to be incarcerated than men without them. COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW, *supra* note 31, at 2 (citing Judith F. Cox, *et al.*, *A Five-Year Population Study of Persons Involved in the Mental Health and Local Correctional Systems*, 28 J. BEHAVIORAL HEALTH SERVS. & RESEARCH 177 (2001)) (figures based on study of New York state prison system).

[45] Sen. Patrick Leahy, Statement Before Executive Business Meeting (Oct. 23, 2003) (in support of S. 1194, the Mentally Ill Offender Treatment And Crime Reduction Act Of 2003).

[46] HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4. The Special Investigations Division of the House Committee surveyed every juvenile detention facility in the United States. *Id.* at i. (stating that study is the first to survey the criminal detention of mentally ill juveniles nationwide). Detention facility administrators in 49 states responded to the survey, with seventy-five percent of all facilities responding. *Id*. (New Hampshire failed to respond. *Id*. at 4-5). The Committee's report defines juvenile detention facilities as "secure correctional

United States, "the inappropriate incarceration of . . . youth with serious mental disorders," some as young as seven years old,[47] who have been "placed in detention without any criminal charges pending against them."[48] In the period covered by the survey, about "11% of all youth incarcerated at these facilities" were non-offenders;[49] corrections facilities in 33 states "report[ed] holding youth with mental disorders without any charges against them" because "[n]o other place would accept the child[ren]."[50]

The prevalence of people with mental illnesses in criminal confinement, and the role that mental illness itself plays in causing adults and children to become criminally confined, has led reform-minded law makers to conclude that "[w]e have basically made mental illness a crime in this country."[51]

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facilities" but "does not refer to the juvenile prison system, where youth who are convicted of crimes . . . serve their sentences." *Id.* at 3.

[47] *Id.* at i, 6 (2004). Additionally, 117 facilities reported incarcerating children aged 10 and younger based on mental illness alone. *Id.* at 6.

[48] *See* Testimony of Rep. Henry A. Waxman, *Juvenile Detention Centers: Are They Warehousing Children with Mental Illness?*, Governmental Affairs Committee, U.S. Senate (July 7, 2004). The House of Representatives also found the confinement of youth with psychiatric diagnoses who had committed offenses ranging in severity. HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4, at i. The mental illnesses suffered by these children principally include depression, schizophrenia, eating disorders, and post-traumatic stress disorder. *Id.* at 9. This Article excludes from discussion the confinement of children with non-psychiatric disabilities such as retardation.

[49] HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4, at ii, 8. Relatedly, many families are forced to relinquish custody of their children to juvenile justice or child welfare agencies exclusively so that the children could receive mental health services. *See* Hearings before the Senate Committee on Governmental Affairs, *Nowhere to Turn: Must Parents Relinquish Custody in Order to Secure Mental Health Services for Their Children?* (S. Hrg. 108-169) (July 15 and 17, 2003); *see also* GENERAL ACCOUNTING OFFICE, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES 2003.

[50] HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4, at 5.

[51] Judge Steven Leifman, Miami Dade County Court, Florida, *quoted in* COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW, *supra* note 31, at 2. *See also* PRESIDENT'S NEW FREEDOM COMMISSION ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 43-44 (2003) (calling current public order paradigm the "criminalization of mental illness").

B. Financial and Human Costs of Incarcerating People with Mental Illnesses.

> "*We cannot afford to maintain that practice [of confining violent offenders for life] if we continue incarcerating nonviolent offenders or misdemeanants who are in prison or jail only because they have a mental illness*."
>
> — Senator Robert Thompson, Chair, U.S. Senate Appropriations Committee.[52]

The confinement of adults and children with mental illnesses in penal facilities comes at an extraordinarily high cost to the U.S. economy, not to mention to the people who are incarcerated. The direct costs of the public order response to people with mental illnesses consist of the costs of involvement in the criminal justice system from arrest through incarceration and release. Indirect costs consist of the lost productivity of the person with the mental illness (due to untreated illness, confinement, and premature death (suicide)), and of the family members who provide unpaid care for them.[53] An additional and substantial indirect cost is the cost of suffering from a major, untreated or undertreated disease.[54] Although the total direct and indirect costs cannot be calculated using existing data,[55] estimates of even the partial direct costs, costs

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[52] Senator Robert Thompson, Chair, Senate Appropriations Committee, *quoted in* COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW, *supra* note 31, at 3.

[53] These estimates of economic cost do not attempt to monetize, and therefore do not account for, indirect but important human costs imposed on people with mental illnesses and their families resulting from incarceration, such as, *e.g.*, the exacerbation of psychiatric disease in the prison environment, reduced opportunities resulting from the fact of prior incarceration, and dignitary and status-related losses resulting from incarceration.

[54] *See* Frank A Sloan, *et al*., *Alternative Approaches to Valuing Intangible Health Losses: The Evidence for Multiple Sclerosis*, 17 J. HEALTH ECON., 475, 490 (1998) (calculating intangible losses of suffering from a chronic disease, measured on a willingness-to-pay model by sufferers of the disease, as ranging between $375,000 and $880,000). For discussion of methods to value the indirect costs (or intangible losses) imposed by disease, see George W. Torrance, *Utility Approach to Measuring Health-Related Quality of Life*, 40 J. CHRONIC DISEASES 593-600 (1987); George W. Torrance, *Measurement of Health State Utilities for Economic Appraisal*, 5 J. HEALTH ECON. 1-30 (1986). These foundational approaches limit their calculations to the intangible costs associated narrowly with a disease state, such as suffering; they may not account for additional costs that may be imposed by social stigmas related to specific diseases.

[55] Kathryn J. Bennett, *et al*., *Cost-Utility Analysis in Depression: The McSad Utility Measure for Depression Health States*, 51 PSYCH. SERVS. 1171, 1171 (2000) (stating that cost-utility analysis applied to determining the total economic burden of physical diseases has not been widely applied to psychiatric diseases; suggesting applications of utility theory to the calculation of the costs of psychiatric illnesses).

attributable to incarceration alone, are immense: A conservative estimate, as set forth below, is that state prisons spend about $4.75 billion dollars annually exclusively to incarcerate nonviolent mentally ill inmates. State governments particularly feel the burden, arguing in a recent report of state governments that "the fiscal implications make it impossible to ignore the growing number of people with mental illness in the criminal justice system."[56] Federal lawmakers also increasingly recognize that criminally confining non-offending and non-violent people with mental illnesses imposes massive costs on the criminal system and deprives the economy of the productivity that could be liberated through treatment.[57]

Holding aside justice concerns, the direct and indirect costs of incarcerating offenders constitute a rational expenditure, under the classical liberal calculus, if the benefits in public safety and deterrence equal or exceed the costs of incarceration.[58] Yet, many of the costs incurred as a result of the public order response to people with mental illnesses produce no quantifiable benefits. Even insofar as the public order response to people with mental illnesses produces utility, the net utility of incarcerating an offender with a severe mental illness relative to a matched, non-mentally ill offender will be lower because of the higher costs associated with incarcerating the mentally ill person and the reduced impact on deterrence.[59]

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[56] COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW, *supra* note 31, at 3. Corrections administrators also contend that the incarceration of people with mental illnesses is creating significant budgetary concerns for prisons, arguing that "[t]he sooner we get people with mental illness who don't represent a threat to public safety out of the corrections system . . . the more likely we are to realize the savings[.]" Reginald A. Wilkinson, President, Association of State Correctional Administrators, Testimony before the United States Senate Judiciary Committee (Jul. 30, 2003) (testimony in support of the Mentally Ill Offender Treatment and Crime Reduction Act of 2003 (S. 1194)).

[57] Senator Robert Thompson, Chair, Senate Appropriations Committee, *quoted in* COUNCIL OF STATE GOVERNMENTS, PROJECT OVERVIEW, *supra* note 31, at 3.

[58] It is not within the scope of this Article to ascertain whether incarceration across other offender categories results in net costs or benefits to society.

[59] The exception here would be for the small percentage of particularly violent mentally ill offenders whose confinement is required on public safety grounds only. Such offenders comprise approximately three percent of all

1. Direct Costs.

Direct costs of responding through the criminal system to the public health and public order problems posed by untreated or undertreated mental illness include costs of arrest, jail detention, judicial and legal resources, incarceration, and probation costs. Although costs are incurred at every step of the criminal process, the major costs result from incarceration in jails and prisons. It is "significantly more expensive to incarcerate individuals with mental illness than other inmates" convicted of equivalent offenses.[60] In fact, it is about seventy-five percent more expensive to incarcerate people with mental illnesses than people without them.[61] [62] For the cost of one mentally ill inmate, a state could incarcerate 1.75 non-mentally ill inmates at no budgetary increase.

Beyond higher daily costs, people with mental illnesses also are more costly to incarcerate because they are sentenced to and serve longer sentences than other offenders

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inmates with severe mental illnesses. *See* CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 13 (I have extrapolated from figures provided for the New York City corrections system). However, it would be reasonable to argue that confining such an offender in a secure psychiatric facility would yield a higher net utility than confinement in a prison. This conclusion is consistent with the practice of certain prison systems, which in fact do shift the most violent mentally ill offenders out of prisons to secure psychiatric facilities that are better equipped to handle them. *See* CORRECTIONAL ASSOC. OF N.Y., *supra*, at 15-16.

[60] Wilkinson, *supra* note 56, (testimony before Judiciary Committee in support of the Mentally Ill Offender Treatment and Crime Reduction Act of 2003 (S. 1194)).

[61] The average cost of incarcerating an offender in state prison is $80 per day, or $29,200 annually. *Id.* Incarcerating a mentally ill inmate, because of the additional disciplinary, restrictive, medical and other resources required, costs approximately $140 per day, or $51,100 per year. *Id.* (citing average figures for the state of Pennsylvania). Similarly, the average annual cost to incarcerate a non-mentally ill inmate in New York State is about $32,000. NYS DEP'T OF CORRECTIONAL SERVICES, 1996-97 PER CAPITA COST REPORT, FISCAL YEAR 4/01/96-3/31/97.

The daily cost figure cited above is an average across all offenders, both non-mentally ill and mentally ill. *See* Wilkinson, *supra* note 56. Accordingly, the average cost to incarcerate non-mentally ill offenders is less than $80 per day, as the $80 per day figure includes in it the higher cost of incarcerating mentally ill inmates.

[62] Wilkinson, *supra* note 56.

convicted of equivalent crimes.[63] Mentally ill offenders on average are sentenced to 12 months longer than other inmates in prison for the same categories of offenses.[64] Yet, even holding sentence length equal, a mentally ill inmate willserve more time: If an inmate tries to kill himself or herself, or "acts out," he or she may be placed in solitary confinement, and may have time added to his or her sentence.[65] Accounting for sentence- and behavior-related factors, the average mentally ill inmate serves 15 months longer than a non-mentally ill inmate convicted of the same type of offense.[66] Longer incarceration affects all categories of mentally ill offenders, from felons to misdemeanants.[67]

More time served means a higher total cost of incarceration. Atthe average daily costs of $140 per day to incarcerate a mentally ill inmate, the difference in time served costs nearly $64,000—above and beyond the costs of the base sentence length for the offense. These higher individual costs add up to staggering overall costs. Using figures for state prisons alone, the cost of incarceration of nonviolent mentally ill inmates is $4.76 billion annually. This estimate does not include costs incurred in state jails, federal prisons and jails, and juvenile corrections facilities.[68] Assuming conservatively that these other systems collectively accommodate one

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[63] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 7-8. *See also* Frank J. Porporino & Laurence L. Motiuk, *The Prison Careers of Mentally Disordered Offenders*, 18 INT'L J.L. & PSYCHIATRY 29, 42 (1995); Michael Winerip, *The Way We Live Now: The Juror's Dilemma*, N.Y. TIMES, November 21, 1999, at Sec. 6, Page 29.

[64] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 8 & Tab 12.

[65] CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 7.

[66] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 8 & Tab 12. On average, a non-mentally ill inmate serves 88.3 months in prison while a mentally ill inmate serves 103.4 months. *Id.* at Tab 12.

[67] Marjorie A. Rock & Gerald S. Landsberg, *County Mental Health Directors' Perspectives on Forensic Mental Health Developments in New York State*, 25 ADMIN. & POL'Y IN MENTAL HEALTH 327, 327 (1996).

[68] Costs of confining non-offending mentally ill youth in detention centers are not available, but center administrators call secure detention centers "the most expensive mental health ward for youth[.]" HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4, at 8.

quarter the number of nonviolent mentally ill inmates as state prisons, and at equivalent costs, then the total annual direct incarceration costs for *non*violent and *non*offending people with mental illnesses would be approximately $5.95 billion annually.[69]

An irony in light of the tremendous taxpayer expense of paying for mental health confinement through the criminal justice system is that increased mental health coverage through the insurance system would cost very little. A study by the Rand Corporation found that if private insurance plans were to cover psychiatric conditions on the same terms as other physical illnesses, the additional cost per worker per year would be one dollar.[70]

2. Indirect Costs.

The indirect costs of the public order response to mental health issues may exceed the direct costs but are more complex to estimate. The President's Commission on Mental Health estimates that annual economic indirect cost of mental illnesses for the entire U.S. population is $79 billion.[71] The figure does not include lost utility from poorer quality of life for people suffering from untreated or undertreated diseases. Severe mental illnesses account for nearly twenty-five percent of all disability (hence, lost productivity) across industrialized countries,[72] while all communicable diseases and all types of cancer each account for less than five percent.[73]

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[69] This estimate does not even capture the consumption of judicial, legal, and police resources involved in processing a mentally ill person through the criminal system.

[70] Associated Press, *Mental Care Coverage Cost Little, Study Finds*, NY TIMES, Nov. 12, 1997 (citing study by Rand Corporation).

[71] PRESIDENT'S NEW FREEDOM COMMISSION, *supra* note 51, at 3 (2003) (citing WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH (2002)). Approximately $63 billion results from lost productivity. *Id.* Most of the remainder consists of $12 billion in mortality costs (that is, lost productivity caused by premature death) and $4 billion of lost productivity of care givers (usually uncompensated family members). *Id.*

[72] *Id.* at 19.

[73] *Id.* at Fig. 1.1. According to the World Health Organization, suicide "causes more deaths every year than homicide or war." *Id.* at 20 (quoting World Health Organization) ("suicide is the leading cause of violent deaths

These productivity losses do not result directly from a preference for a public order over a public health response to mental illnesses. Yet, they are linked:[74] Productivity losses and death rates resulting from mental illnesses, as with many other types of illnesses, are not fixed but correlate to access to treatment. Greater rates of treatment ameliorate disease, enhance the well-being of the individual and the people in his or her constellation, and reduce productivity losses.[75]

A significant driver of lost productivity is the use of prisons and jails as the primary providers of mental health services. Once released from prison or jail, a mentally ill individual experiences the abrupt withdrawal of any treatment he or she received in prison, and "decompensate[s]" rapidly into homelessness and re-arrest.[76] This use of prisons as primary mental health care providers results in "the cycle that has . . . made jails and prisons . . . the new psychiatric institutions."[77]

The costs of incarceration and associated undertreatment of psychiatric illness, although difficult to quantify, are real. These costs represent an additional category of pure social loss because no one "receives" the additional suffering of an untreated mentally ill inmate. That is, assuming society receives benefit from the satisfaction of retributive or other urges toward

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worldwide, outnumbering homicide or war"). Worldwide, suicide accounts for 49.1% of violent deaths, homicide for 31.3%, and war-related deaths for 18.6%. *Id.* at 21, Fig. 1.2.

[74] PRESIDENT'S NEW FREEDOM COMMISSION ON MENTAL HEALTH, INTERIM REPORT OF THE PRESIDENT'S NEW FREEDOM COMMISSION ON MENTAL HEALTH 1 (2002) ("[T]he ideal mechanism to prevent people with mental illness from entering the criminal justice system is the mental health system itself.").

[75] PRESIDENT'S NEW FREEDOM COMMISSION, *supra* note 51, at 43. Treatment for mental illnesses also can improve quality of life vastly. As the monetization of quality of life enhancements is speculative, it has not been included in calculations here. However, an account of the benefits of treatment would be incomplete without a consideration of the impact on the well-being of people treated.

[76] CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 7.

[77] *Id.*

offenders through their incarceration, no further benefit is conferred by the special suffering of one class of prisoners unrelated to their offense.[78]

3. Decreased Utility from Incarceration.

Classical deterrence rationales cannot account for the disproportionate incarceration of people with mental illnesses, nor justify its extraordinary cost. According to classical deterrence theory, the law should punish where, and to the extent that, inflicting punishment maximizes social welfare.[79] In the liberal formulation, the state is justified in coercing an individual only to prevent harm; if incarceration does not further public safety specifically and generally, incarceration is not justified.[80]

Yet, not only are costs higher, the net utility of incarcerating people with mental illnesses is lower because the safety and deterrence gains from incarcerating the average mentally ill prisoner are lower. For the substantial number of adults and children with mental illnesses who are incarcerated without charge or on fabricated charges, the costs of incarceration are not offset

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[78] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1223 (1985) (analyzing utility of specific forms of punishment based on whether society "receives" the disutility the offender suffers).

[79] JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 WORKS 126-35 (John Hill Burton ed., 1998) (1843) (asserting that whether good or bad, the moral quality of an individual's motivations or character should not affect punishment independently of the individual's propensity to frustrate the maximization of social welfare). *See also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 223-231 (5th ed. 1992) (presenting an economic model to evaluate criminal punishment).

The economic model of deterrence originates in eighteenth century legal and economic thought. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 209 (1968) (explaining that the eighteenth and nineteenth century thinkers Beccaria and Bentham "explicitly applied an economic calculus"). The standard economic model calculates optimal deterrence as the product of the value of the penalty (p) and the probability of detection (pdet), where the value of the penalty depends upon cost, or harm (h), the crime causes. David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 736-37, 740 (2001). This formula in theory establishes the efficient level of punishment because it creates incentives for an actor to obey the prohibition where the predicted punishment cost exceeds the value from committing the offense. *Id.*

[80] JOHN STUART MILL, ON LIBERTY *passim* (John Gray & G.W. Smith eds., 1991) (1859). *See also*, John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), *reprinted in* THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 110 (H.B. Acton ed., 1969) ("If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise is not," *citing* LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 1750-1833 (1948)).

by any gains in public safety or deterrence and thus are a pure loss. For example, juvenile detention facilities alone spend an estimated $100 million each year simply to warehouse without treatment non-offending children awaiting mental health services.[81] Because the criminal confinement of non-offenders cannot serve either deterrence or incapacitation, their confinement is irrational in economic terms and under classical principles of liberalism and deterrence theory.

The specific deterrence gains from incarcerating mentally ill individuals who have been convicted of offenses also are lower. Specific deterrence as a result of incarceration, as judged on recidivism rates, is demonstrably poorer as to mentally ill offenders. Mentally ill inmates in state prisons are nearly ninety percent more likely than non-mentally ill inmates to have been convicted of eleven or more prior offenses; in federal prisons, mentally ill inmates are nearly three hundred-fifty percent more likely than non-mentally ill inmates to have been convicted of eleven or more prior offenses.[82]

Regardless of the causes of recidivism among this population, [83] the markedly higher recidivism rate shows that society receives less specific deterrence benefit from their

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[81] HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4, at ii. This estimate does not include any of the additional expense in service provision and staff time associated with holding youth in urgent need of mental health services. *Id*. *See also id.* at 9-10 (reporting that over one quarter of detention facilities where youths are held for mental health reasons provide no mental health treatment; further reporting that staff at over half of all facilities receive "very poor or no training" in handling or treating children suffering from mental illnesses).

[82] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 5, Tab 6. In state prisons, ten percent of mentally ill inmates and 5.3 percent non-mentally ill inmates have been convicted of eleven or more prior offenses, an eighty-nine percent difference. *Id.* In federal prisons, 9.7 percent of mentally ill inmates and 2.2 percent non-mentally ill inmates have been convicted of eleven or more prior offenses, a three hundred forty-one percent difference. *Id.*

[83] Various hypotheses have been advanced to account for the discrepancy in recidivism between mentally ill and non-mentally ill offenders. Mental illness itself may prevent a mentally ill offender from being deterrable. Where the biological symptoms of untreated mental illness constitute the offense (as with some nuisance or property offenses), the notion of deterrence simply may not apply. Some researchers contend that the very use of prisons as the main source of mental health treatment causes people with mental illnesses to cycle in and out of prison. CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 7.

incarceration relative to other offenders.[84] This diminished benefit is not offset by other factors such as, *e.g.*, a greater public safety benefit, as at least half of state mentally ill inmates and two-thirds of federal mentally ill inmates are incarcerated for nonviolent offenses,[85] and, as noted, many jail inmates may not have committed any offense. There can be no gain in specific deterrence from incarceration where the individual did not offend in the first place.

4. Substitute Response Costs and Benefits.

Responding to problems presented by acute mental illness through law enforcement and emergency medical interventions costs more and produces less benefit than an integrated public health response. A study by New York State found that the state can provide complete, integrated services for a severely mentally ill person, including supervised housing, daily nurse visits, mental health services, and medication, for $25,000 per year.[86] This is less than half the direct cost of incarceration and one quarter the cost of a combination of ineffective emergency room treatment and law enforcement responses.[87] Similarly, the President's Commission on Mental Health has found that permanent supportive, supervised housing is cost effective relative to the combination of law enforcement and emergency medical responses.[88] These substantial direct savings do not factor in the economic losses avoided by preventing law-breaking behavior

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[84] Posner, *supra* note 78 at 1223 (discussing deterrence and recidivism). For Posner's analysis of the insanity defense, see *id*. at 1223-24.

[85] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4, at 4, Tab 5 (showing that approximately one half of mentally ill state prisoners, and two-thirds of mentally ill federal prisoners, were incarcerated for nonviolent offenses).

[86] Michael Winerip, *Report Faults Care of Man Who Pushed Woman Onto Tracks*, N.Y. TIMES, November 5, 1999, at B1 (citing a confidential New York State report obtained by The New York Times).

[87] *Id*.

[88] PRESIDENT'S NEW FREEDOM COMMISSION, *supra* note 51, at 42-43 (citing savings of $16,282 per person per year of accommodating mentally ill homeless individuals in supportive housing compared to previously-incurred annual costs for corrections, shelters, and mental health interventions for the same individuals).

and obviating the need to process a mentally ill offender through the criminal justice system before and after incarceration. Such an integrated response also may produce actual benefits in the form of enhanced economic productivity and individual well-being.

The economic and human problems presented by the public order response to people with mental illnesses have not gone unnoticed: Initiatives and reports by, among others, a presidential commission,[89] a Congressional commission,[90] the U.S. Senate,[91] the Department of Justice,[92] the Department of Health and Human Services,[93] the General Accounting Office,[94] a commission of state governments and corrections officials,[95] and major advocacy groups have focused on the disutility of a public order response to the issues posed by people with mental illnesses.[96] These groups uniformly have concluded that addressing problems posed by people with mental illnesses through the criminal justice system is harmful and inefficient, and urge that steps be taken to relocate the center of intervention from the criminal legal system to the public health system. Yet, no political groundswell has emerged to shift from the public order to the public health response and to liberate the value from such a shift.

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[89] Exec. Order No. 13263, 3 C.F.R. 233, *supra* note 4.

[90] HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH, *supra* note 4.

[91] Wilkinson, *supra* note 56.

[92] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND INMATES, *supra* note 4; BUREAU OF JUSTICE STATISTICS, 2003 REPORT, *supra* note 4 (reporting extensively on mentally ill individuals in prisons and jails).

[93] DEP'T OF HEALTH AND HUMAN SERVICES: A REPORT OF THE SURGEON GENERAL, *supra* note 4.

[94] GENERAL ACCOUNTING OFFICE, *supra* note 49

[95] COUNCIL OF STATE GOVERNMENTS, *supra* note 4.

[96] Among others, see HUMAN RIGHTS WATCH, *supra* note 40; MARTIN DRAPKIN, CIVIC RESEARCH INSTITUTE, MANAGEMENT AND SUPERVISION OF JAIL INMATES WITH MENTAL DISORDERS (2003); CORRECTIONAL ASSOC. OF N.Y., *supra* note 23.

III. The Social Utility of the Public Order Response to People with Mental Illnesses.

A. The New Chicago School & The "Social Meaning Turn"

"What or whom [a society] values" is shown by what and whom it chooses to punish and how severely.[97] Value can be implied from punishment, by who is punished relative to whom else and to what extent. The Part above outlined the prevalence of people with mental illness in criminal confinement and showed that such people are punished more severely (through longer sentences and a higher percentage of sentence served, and, if uncharged or charged on spurious grounds, through incarceration without having committed an offense) than their counterparts without mental illnesses. At the same time, public health alternatives place the least burden on taxpayers and produce far greater economic utility for the community and well-being for individuals with mental illnesses. The persistence of the public order response in the face of public health alternatives indicates that a social value is placed on the criminal confinement of people with mental illnesses.

The value placed on the criminal confinement of people with mental illnesses cannot be direct economic utilitybecause their incarceration is not value positive. Rather, it is likely tha t the preference for the criminal confinement of people with mental illnesses carries "expressive" value. Legal regimes "are expressive; they carry meanings."[98] The meanings carried and reinforced by a legal regime can be termed their "expressive utility," which can be "incorporated into the social-welfare calculus" to assess the efficiency of a legal regime and potential alternatives.[99] If the public has a taste for the "moral condemnation" of a particular category of

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[97] Kahan, *Social Meaning and the Economic Analysis of Crime*, *supra* note 13, at 614 (internal punctuation omitted); *see also* Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 130 (1988).

[98] Sunstein, *supra* note 11, at 2021-22.

[99] Kahan, *Social Meaning and the Economic Analysis of Crime*, *supra* note 13, at 620, n.48.

wrongdoers through the imposition of criminal liability, then the law "creates social welfare . . . when the law satisfies that demand[.]"[100]

The welfare created through the satisfaction of a community's tastes can transform an apparent economic loss into a social surplus, and cause the apparently inefficient practice to be highly conserved. Sunstein illustrates this point in a way that is entertaining but trenchant with his analysis of Joel Waldfogel's economic critique of Christmas. In Waldfogel's *The Deadweight Loss of Christmas*, Waldfogel finds that holidaygift exchange results in deadweight economic loss because gift givers expend time searching for gifts that exceeds the value recipients place on that search time and also because recipients derive less economic value from the gift than they would from the same amount of cash.[101] Sunstein argues that this critique misses the point and constitutes an incomplete economic analysis, both for the same reason: Waldfogel fails to account for the social meanings, and concomitant social value, of gift exchange instead of cash exchange in the context of Christmas.[102] The positive social meaning of gift giving fills the "gap" between the deadweight loss found by (at least one) classical economic analysis. Somewhat less whimsically, Kahan similarly demonstrates that the apparent economic irrationality of imposing criminal liability on corporations also may be rationalized by accounting for the positive value community members place on satisfying their taste for the punishment of wrongdoers, even when the wrongdoer is an insensate legal entity.[103]

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[100] *Id.* at 619.

[101] 83 AM. ECON. REV. 1328 (1993).

[102] Sunstein, *supra* note 11, at 2036-37.

[103] Kahan, *Social Meaning and the Economic Analysis of Crime*, *supra* note 13, at 618 (citing Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) and V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996)).

Once social meaning is identified as the term that causes an otherwise inefficient practice to create social utility, and thus to be conserved, a conclusion is clear: To change the practice or legal regime—whether to advance competing values or to achieve economic efficiencies—the specific social meanings that maintain the practice must be put into contest.[104]

This raises the question of what the social meaning at issue is. Social meanings are "the semiotic content attached to various actions, or inactions, or statuses"—that is, "texts"—"within a particular context."[105] Establishing the social meaning of any given text is complex,[106] though possible.[107] Numerous methods of ascertaining the meanings of texts in different contexts have been proposed.[108] This Article does not purport to ascertain definitively the many meanings of mental illness in relation to perceptions of social order. Yet, drawing on empirical work from legal and social sciences scholarship, it suggests that there are two conceptions or models of mental illness at play in the culture. These are the moral/punitive conception, which is the dominant model, and the medical/therapeutic conception, which is subsidiary.

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[104] *Id.* at 610 (1998) ("[C]ommunities . . . structure the criminal law to promote the meanings they approve of and to suppress the ones they dislike or fear. Economic analyses that ignore these expressive evaluations produce unreliable predictions and uncompelling prescriptions.")

[105] Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995). A social meaning is comprised of a "text" and a "context" that gives the text its meaning. *Id.* at 958. Together, the "text, in context, activates the association." *Id.*

[106] Bernard E. Harcourt, *Measured Interpretation: Introducing the Method of Correspondence Analysis to Legal Studies*, 2002 U. ILL. L. REV. 980, 982 (calling the ascertainment of social meaning "one of the greatest challenges that interpretive legal scholars and social scientists face"); *see also, e.g.*, Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2188 (1996) ("Meanings are often highly contestable and sometimes hard to know."). There may be a range of social meanings for any given text. Lessig, *Regulation of Social Meaning*, *supra* note 105, at 955 ("Even if there is no single meaning, there is a range or distribution of meanings, and the question we ask here is how that range gets made, and, more importantly, changed.").

[107] Andrew Abbott, *Seven Types of Ambiguity*, 26 THEORY & SOC'Y 357, 358 (1997) (arguing that social meanings are susceptible of rigorous analysis, allowing one to "think formally about the social world").

[108] *See, e.g.*, Harcourt, *supra* note 106, at 984 (proposing correspondence analysis as a tool for determining social meanings).

Under the moral/punitive model, mental illness is understood as a failure of individual responsibility: People who behave in a manner currentlytermed "mentally ill" are failing to control themselves and must have greater measures of control imposed on them to bring them in line with accepted behaviors. Under the medical/therapeutic view, by contrast, mental illnesses are understood as diseases that require and respond to medical treatment, as with any other disease.

The dominant social meaning, this Part argues, which is consistent with the criminal law response to people with mental illnesses, has a positive social value that is not captured either in economic or rights-based critiques of the public order response to people with mental illnesses. It is this positive social value that fills the apparent gap between the existing regime and the theoretical, efficient alternative, causing the economically wasteful regime to be preferred to treatment-based, cheaper alternatives. Accordingly, this social meaning will need to be the focus of agents who seek to reduce the economic and human costs of the public order-based regime.

B. Two Models of Mental illness: The Moral/Punitive and the Medical/Therapeutic.

Under the moral/punitive conception of mental illness, people with mental illnesses are seen as expressing defects of will or character. Following this view, people who act "mentally ill" are failing to control themselves and must have greater measures of control imposed on them to bring them in line with accepted behaviors. The view of mental illness as a moral or character failing unites it with the important norm of individual responsibility. The responsibility norm, that all individuals are responsible for their conduct and its consequences except under certain narrow exceptions, is foundational to the criminal law (and to the culture more broadly).

Under a view that equates the correction of aberrant behavior by people with mental illnesses with reinforcing the important norm of responsibility for one's conduct, it would be

unthinkable to excuse people from the consequences of their actions on the ground of mental illness. The historical and current resistance to conceiving of mental illnesses as being beyond one's control likeother diseases springs from the view that doing so would excuse all kinds of bad behavior. The notion is that if "sick" people are excused, then all kinds of bad behavior will be deemed "sick." This conflation of the "mad" and the "bad," this argument runs, will bring about a state of affairs where no one will be held accountable for bad acts. This notion that mental illness must be policed as a failure of responsibility, and that such punishment reinforces the norm of individual responsibility, finds expression in legal scholarship, among mock and actual juries, and in the beliefs and actions of lawmakers. The unacceptability of hospital-based confinement as a potential "alternative sanction," discussed *infra*, also attests to the primacy of the moral/punitive model over the medical/therapeutic.

1. Responsibility Rhetoric Among Scholars, Lawmakers and Community Members.

People with mental illnesses are used instrumentally to effectuate and support general notions of social responsibility, without taking into account the fact that their actions may have been caused by a genuine physical disease. Richard Bonnie, a scholar who has written extensively in favor of restricting or eliminating the insanity defense,[109] argues that a narrow insanity test has value because it permits the effectuation of normative judgment about individual

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[109] Richard J. Bonnie et al., *The Case of Joy Baker*, *in* CRIMINAL LAW 456, 456-65 (Richard Bonnie ed. 1997); PSYCHIATRISTS AND THE LEGAL PROCESS: DIAGNOSIS AND DEBATE (Richard Bonnie ed. 1977); Richard J. Bonnie *et al.*, *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48 (1996) (surveying the decision processes of 139 attorney-client pairs in determining whether to plead insanity); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 MIAMI L. REV. 539 (1993); Richard Bonnie & Norval Morris, *Debate: Should the Insanity Defense Be Abolished?*, 1 J.L. & HEALTH 113, 119 (1986-87); Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983). Although it is not the purpose of this Article to reprise arguments for an against the insanity defense, scholarship and legislative activity around the insanity defense provides a wealth of material expressing views of people with mental illnesses and of the relationship between mental illness and individual responsibility.

responsibility.[110] He argues that the Model Penal Code insanity test should be revised to eliminate consideration of whether a defendant suffered from a "volitional" impairment resulting from a mental disease or defect.[111] Bonnie's objection to the volitional prong is not that it is inaccurate. Rather, he allows that an actor genuinely may lack control over his actions due to disease.[112] Yet, he contends, even in "compelling cases of volitional impairment," mentally ill actors should be held criminally accountable as if their actions resulted from intent, because their exculpation "would be *out of touch with commonly shared moral intuitions*" about responsibility.[113]

The bias against people with mental illnesses, as well as the inconsistency with liberal tenets of justice, in this argument become apparent if one substitutes another illness into Bonnie's arguments. Imagine now that the disease instead was food poisoning. Severe food poisoning (as readers might know from experience) can cause a person to lose control of bodily functions; a person might involuntarily vomit, or worse, in public. Bonnie's position, applied to food poisoning, would be that a person with severe food poisoning should be criminally punished for being sick in public in order to support "shared moral intuitions" about public hygiene. Certainly public hygiene is an important norm, essential to modern collective living. And diverse types of regulation exist to enforce public hygiene. But no one suggests that a person should be thrown in jail because he or she has food poisoning.

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[110] Bonnie, *Moral Basis*, *supra* note 109 (emphasis added).

[111] *Id*. at 197.

[112] *Id*.

[113] *Id*.

Other scholars who advocate the elimination of a defense based on "insanity" argue that the defense is both too restrictive and too permissive. The excuse of insanity is too restrictive because, it is claimed, it favors loss of control based on mental illness but fails to extend the same latitude to people who have suffered the impact of negative exterior circumstances such as poverty, drug use, and child abuse. It is too permissive, it is claimed, because once a defense of insanity is permitted, then the door is open for any form of hardship to form the basis for an excuse from guilt for criminal conduct. Although most closely associated with Norval Morris, this view has had numerous advocates over time.[114]

Bonnie and Morris represent the two major views on why people with mental illnesses should be dealt with in the criminal system. The first view is that punishment of people with mental illnesses serves a purpose, so the impact of mental illness in causing lawbreaking behavior is irrelevant. The second, more widely shared, view is a variation of the familiar slippery slope argument: If the law allows any recognition that a person with a severe illness cannot control their behavior, then no one will control their behavior, and the world will go wild. At the heart of arguments typified by Morris is the idea that mental "illness" is not a real phenomenon. Rather, they imply, "illness" is merely a label applied to people who commit blameworthy acts, instead of a set of real and treatable medical conditions distinct from simple bad behavior. This view was encapsulated neatly by a speechwriter for Ronald Reagan, who argued:

> If you commit a big crime then you are crazy, and the more heinous the crime the crazier you must be. . . . [Y]ou can wait like a jackal and shoot a

[114] NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982). *See also, e.g.*, RUDOLPH JOSEPH GERBER, THE INSANITY DEFENSE 85-89 (1984); SEYMOUR L. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME: A STUDY OF CAUSES, PUNISHMENT AND TREATMENT 212-28, 341-42 (1967); H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 24-25 (1964); THOMAS S. SZASZ, LAW, LIBERTY, AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES 123-46 (1963); Alexander D. Brooks, *The Merits of Abolishing the Insanity Defense*, 477 Annals Am. Acad. Pol. & Soc. Sci. 125 (1985).

> man in the head and leave him for dead and buy your way out with clever lawyers and expensive psychiatrists. Therefore you are not responsible, and nothing is your fault.[115]

Of course, the statistics on people with mental illnesses in prison and jail show the falsity of this view. People who commit big crimes may or may not buy their way out expensive lawyers, but they certainly don't do it with expensive psychiatrists. The insanity defense rarely is invoked and almost never succeeds.

Intermittently, federal and state legislators introduce bills to eliminate the insanity defense based upon its putatively pernicious effect on notions of individual responsibility and (equally putative) overuse.[116] The comment by a Montana state legislator introducing a bill to abolish the insanity defense in his state illustrates: "I believe that criminal law should presume that each of us is capable of free choice of behavior. . . . My purpose with the bill is to hold people accountable for their criminal acts."[117]

Statements about the importance of limiting the federal insanity defense show that these debates are symbolic: The incidence of insanity defense pleas is so negligible that the only impact of narrowing the federal insanity defense would be its symbolic effect in reinforcing normsof responsibility and social meanings related to people with mental illnesses.[118] Based on

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[115] PEGGY NOONAN, WHAT I SAW AT THE REVOLUTION: A POLITICAL LIFE IN THE REAGAN ERA 29 (1990).

[116] Five states have abolished the insanity defense, replacing it with the general *mens rea* approach common to other criminal inquiries. *See* Idaho Code § 18-207 (1997); Kan. Stat. Ann. § 22-3220 (1995); Mont. Code Ann. § 46-14-214 (1999); Nev. Rev. Stat. Ann. § 174.035 (Michie 1997); Utah Code Ann. § 76-2-305 (1999). For a discussion of efforts to restrict or abolish the insanity defense for federal crimes, see LINCOLN CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984), and Lincoln Caplan, *Not So Nutty: The Post-Dahmer Insanity Defense*, THE NEW REPUBLIC, Mar. 30, 1992, at 18, analyzing insanity defense reform activity.

[117] Comments of Rep. Keedy in Hearings on H.B. 877, Abolition of Mental Disease as a Defense, Before the Executive Session of the House Judiciary Committee, 46th Mont. Leg. 12 (Feb. 20, 1979).

[118] In a study reviewing nearly one million felony indictments in eight states, an insanity plea was entered in fewer than one percent (0.93%) of cases and succeeded in about one quarter of one percent of cases (0.26%). Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM.

figures like those discussed in the note below, the federal taskforce on the insanity defense, the National Commission on the Insanity Defense concluded: "The consensus of the experts is that the insanity defense trial is an extremely rare event and a successful insanity defense is even more rare."[119]

Ronald Reagan's Attorney General, William French Smith, endorsed a bill proposed by Senator Orrin Hatch to "effectively eliminate the [federal] insanity defense,"[120] because doing so, he argued, would "restore the balance between the forces of law and the forces of lawlessness."[121] The "forces of law" would triumph again because eliminating the insanity defense would send, he claimed, a strong message that people must be responsible for all their actions.[122] President Reagan similarly endorsed the bill, opining that not holding people with mental illnesses liable for their offenses runs counter to popular feelings about "responsibility."[123]

ACAD. PSY. & L. 331, 334-35 (1991). Another review of half a million felony indictments in four states similarly found an insanity plea rate of about one percent and an insanity acquittal rate of about one quarter of one percent. HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY; EVALUATING INSANITY DEFENSE REFORM 27-28 tbl.2.2 (1993). Numerous other studies have produced similar findings. M. L. Criss and D. R. Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity*, 1975-1979, 8 BULL. AM. ACADEMY OF PSYCH. & AND L. 261 (1980); Richard A. Pasewark, *The Insanity Plea: A Review of the Research Literature*, 9 J. PSYCH. & L. 357 (1981); Richard A. Pasewark, M.L. Pantle, & Henry J. Steadman, *Characteristics and Disposition of Persons Found Not Guilty by Reason of Insanity in New York State*, 1971-1976, 136 AM. J. PSYCH. 655 (1979); C.J. Stokman & P.G. Heitrer, *The Insanity Defense Reform Act in New York State*, 1980-1983, 7 INT'L J. L. & PSYCH. 367 (1984). *Also*, I. K. Packer, *Insanity Acquittals in Michigan 1969-1983: The Effects of Legislative and Judicial Changes*, l3 J. PSYCH. & L. 419 (1985). These studies are somewhat out of date, due to the explosion of interest in the insanity defense after John Hinkley, Jr.'s anomalous insanity acquittal. State and federal insanity defense pleas and acquittals are not regularly tracked or recorded by governmental agencies.

[119] MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 15 (1983).

[120] CAPLAN, *supra* note 116, at 111 (1984).

[121] *Id.*

[122] *Id.*

[123] Lou Cannon, *Two Years After Shooting; President Bears No Grudge*, THE WASH. POST, Mar. 30, 1983, at A1.

Jurors, too, exhibit the twinned views that mental illness is a failure of individual responsibility and that the punishment of people with mental illnesses reinforces the responsibility norm. In one of the largest mock juror studies of decision-making in a capital case, different jurors used the actor's mental illness as a reason for giving a life sentence and for imposing a death penalty. Twenty-four percent of mock jurors imposed death based on a normative responsibility concept, stating that "mental illness is no excuse" because all people "should be responsible."[124] Eighteen percent imposed death because the defendant's failure to seek help (a demonstration of irresponsibility) caused him to be responsible for his mental illness and the consequences that flowed from it.[125]

Actual insanity defense trials, rare though they are, also demonstrate that jurors equate imposing liability on people with concededly severe mental illnesses with supporting the norm of individual responsibility. The case of *New York v. Goldstein* illustrates.[126] Tried twice for the murder of a woman he had pushed in front of a subway train, Andrew Goldstein, a paranoid schizophrenic, raised a defense of insanity. The issue before each jury was Goldstein's

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[124] Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 LAW & HUM. BEHAV. 113, 125 (1987). For the raw data, see *id*. at 124.

[125] Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 LAW & HUM. BEHAV. 113, 125 (1987). For the raw data reported, see *id*. at 124. Twenty percent also imposed death on the argument that the defendant was faking: "Defendant is not crazy; could have fooled psychiatrist." *Id.*

[126] The case concerns the fatal attack on Kendra Webdale by Andrew Goldstein, a paranoid schizophrenic. On January 3, 1999, after unsuccessfully attempting to gain admission to hospitals throughout New York because he claimed he could not control his violent impulses, Andrew Goldstein pushed Kendra Webdale in front of an oncoming subway train, killing her. Julian E. Barnes, *Second Murder Trial Opens In Subway Shoving Case*, N.Y. TIMES, March 4, 2000, at B3. (For a detailed recounting of Goldstein's attempts to gain admission at various hospitals, see Michael E. Winerip, *The Nation: Behind One Man's Mind*, N.Y. TIMES, Dec. 26, 1999, at Sec. 4, Page 3). His first trial, in October and November of 1999, ended in a mistrial when the jury could not agree on the issue of his responsibility under New York's insanity defense test. Julian E. Barnes, *Insanity Defense Fails for Man Who Threw Woman Onto Track*, N.Y. TIMES, March 23, 2000, at A1. His second trial, in March of 2000, in which Goldstein also raised an insanity defense, resulted in a conviction of second-degree murder. *Id.*

responsibility at the time of his act under New York's insanity defense test; the first trial resulted in a hung jury, while the second resulted in a conviction of second-degree murder.

Although the prosecution conceded that Goldstein suffered acute paranoid schizophrenia, the prosecution portrayed him as playing on, or playing up, psychiatric symptoms to escape responsibility.[127] An acquittal would "send a message" that being mentally ill is a "license" to commit violent crimes,[128] while a conviction would send the message that suffering from mental illness does not abrogate responsibility.[129] In this way, the prosecution urged the jury to use their determination whether a particular defendant could form culpable intent as a vehicle to reinforce the norm of responsibility generally.

After the conviction, jurors' comments showed that they adopted the prosecution's urging to use the responsibility determination about a particular mentally ill individual as a way of supporting general norms of responsibility. Jurors reported crediting testimony that Goldstein did not froth at the mouth or drool, and considered his lack of drooling significant to their responsibility determination.[130] Jurors stated that, although they believed Goldstein was legally insane, he was guilty of murder because he threw the victim instead of causing her to fall accidentally through "an involuntary movement."[131] The jurors' cartoonish view of mental

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[127] Julian E. Barnes, *Judge Allows Lesser Charge in Trial of Subway Pusher*, N.Y. TIMES, March 22, 2000, at B5. *See also* David Rhode, *Prosecutors Press Theory That Killer Hates Women*, N.Y. TIMES, Oct. 20, 1999 (stating that the prosecution "intensified an already aggressive effort to vilify Mr. Goldstein as a calculating young man who used his mental illness to escape punishment for his repeated attacks on women.").

[128] David Rhode, *Mentally Ill Man's Kin Absent From His Trial*, N.Y. TIMES, Oct. 31, 1999, at Sec. 1, Page 43.

[129] *Id.*

[130] The prosecution emphasized through the testimony of several witnesses that Goldstein did not drool, asking Detective William Hamilton, an officer present at Goldstein's videotaped confession, "Well, was he drooling or anything like that?" Michael E. Winerip, *Oddity and Normality Vie in Subway Killer's Confession*, N.Y. TIMES, Oct. 19, 1999, at B1.

illness suggests that they used the concept of "responsibility" as a conduit for evaluative judgment and that no set of realistic facts showing mental illness could have influenced them to determine that mental illness relieved the defendant of responsibility.[132] The principle guiding his determination, a juror stated was that "w[e] have to be accountable, all of us, for our actions."[133]

New York lawmakers reflected public concern about the perceived threat posed by people with mental illnesses by framing legislative activity about the people with mental illnesses explicitly in terms of "responsibility." According to New York governor George Pataki, the problem threatening New Yorkers is that the mentally ill are not sufficiently "responsible."[134] This use of "responsibility" arises in an ironic counterpoint to the notion of the nonresponsibility of people with mental illnesses found in insanity defense tests: Following the liberal principle that criminal liability attaches to culpable intent, a defense of insanity is available to individuals who, because of mental illness, did not "intend" the consequences of their actions. Nonresponsibility as used by lawmakers here, however, does not carry the exculpatory meaning that people who are "not responsible" because of mental disease or defect should be exempt from criminal sanction. Rather, because the mentally ill may not be "responsible" enough to prevent themselves from harming others, the governor argued that they

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[131] Barnes, *Insanity Defense Fails*, *supra* note 126, at A1; *see also* Alan Feuer, *Relief for Subway Victim's Family, but a Sense of Duty, Too*, N.Y. TIMES, March 23, 2000, at B6.

[132] David Rhode, *Subway Jury Deadlocked; Mistrial Ruled*, N.Y. TIMES, Nov. 3, 1999, at B1. This view is borne out by interviews with two jurors in Goldstein's first trial voted for acquittal. *Id.* These jurors, a psychiatric nurse and a social worker, spoke of responsibility in medical terms instead of legal terms and focused on criteria specific to Goldstein instead of the broader relationship between Goldstein's crime and the community. *Id.* One juror reported that the other jurors did not consider his arguments about the influence of mental illness on the defendant's behavior because they were "bloodthirsty." *Id.* The other juror reported that the other jurors sought to convict Goldstein for "impermissible" reasons such as "fear" and "revenge." *Id.*

[133] Barnes, *Insanity Defense Fails*, *supra* note 126, at A1.

[134] *Involuntary Commitment Law Controversial*, cnn.com, May 20, 1999 at <<www.cnn.com/kendraslaw.htm/>>. Visited on May 20, 1999.

need additional deterrence to enforce law-abiding behavior. Proposing a measure to make it a jailable offense for a person with a mental illness not to take prescribed medication,[135] Pataki announced, "[i]f [people with mental illnesses] refuse to act responsibly, we must act to protect all New Yorkers."[136] Reinforcing personal responsibility by holding people with mental illnesses responsible is important, he stated, to "protect us as a society[.]"[137]

These legislative activities and statements equating the imposition of criminal liability on people with mental illnesses with reinforcing norms of individual responsibility may be seen as exercises in symbolic politics. In the year following its enactment, Kendra's Law, which lawmakers predicted would affect thousands of mentally ill individuals across New York state, resulted in the commitment of one person—probably not the definitive factor in keeping the public safe.[138] The empirical triviality of laws like Kendra's Law, in contrast to lawmakers' and inflated pronouncements about them, puts the debate on these issues in the same category as highly charged but practically inconsequential issues like flag burning.

As Sunstein notes, "the debate over flag burning has everything to do with the statement that law makes."[139] The lack of impact on whether people with mental illnesses behave

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[135] N.Y. Mental Hyg. Law § 9.60 (McKinney 1999) ("Kendra's Law"). Kendra's Law modifies the existing outpatient commitment procedures provided for under N.Y. Mental Hyg. Law § 9.60(a)(1). Under the law, any family member, caregiver, roommate, partner or friend may alert the police that another person is not taking prescribed psychiatric medication; that person may then be arrested and brought before a judge and must justify the failure to take the medication. If the judge issues an order for her/him to resume medicating, the individual must do so or be subjected to involuntary commitment. N.Y. Mental Hyg. Law § 9.60 (McKinney 1999); *see also* Jennifer Gutterman, Note, *Waging a War on Drugs: Administering a Lethal Dose to Kendra's Law*, 68 FORD. L. REV. 2401, 2401-2 (2000).

[136] Gary Spencer, *Kendra's Law Gets Backing by Both Parties*, N.Y.L.J., .May 20, 1999, at 1.

[137] Raymond Hernandez, *Pataki Proposes Curb on Releases for Mentally Ill*, N.Y. TIMES, Nov. 10, 1999, at A1.

[138] AP Wire Service, *Metro News Briefs: Courts Seldom Use Law on Drugs for Mentally Ill*, N.Y. TIMES, Feb. 14, 2000, at B7 (providing enforcement statistics; calling law a "nonissue").

[139] Sunstein, *supra* note 11, at 2044-45.

responsibly, on deterrence, or on public safety is beside the point because "[m]any debates over the appropriate content of law are really debates over the statement that law makes, independent of its direct consequences."[140] This is particularly true of debates and statements within the criminal law because the "criminal law is a prime arena for the expressive function of law."[141]

Jurors' decisions to convict defendants they acknowledge were legally insane and law makers' efforts to eliminate the insanity defense and to pass legislation specifically aimed at mentally ill individuals (whether law-breaking or not) stand out as exercises in symbolic politics.[142] If citizens and their representatives feel that general norms of personal responsibility are compromised when people exhibit the disruptive symptoms of severe mental illnesses, then the passage of low-cost, low-impact measures, which reemphasize the public's commitment to personal responsibility and purport to enhance deterrence, may not be inconsistent with certain, arguably legitimate, purposes of lawmaking.[143] Speaking in the consequentialist idiom of harm reduction, terms such as responsibility and deterrence allow the law tacitly to incorporate normative judgments of actors and their preferences.[144] Thus the criminal law, while appearing

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[140] *Id*. at 2051 (internal punctuation omitted).

[141] *Id.* at 2044-45.

[142] Barbara Ann Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POL'Y Q. 157, 158-60 (1983) (discussing the use of certain issues as important for signaling social commitments and addressing social fears apart from any direct impact of the measure). Stolz has argued that congressional contests over primarily "symbolic" issues such as capital punishment create social utility through reinforcing shared values and commitments to the maintenance of social order. *Id.* at 166-67. Similarly, Seidman and Tushnet have argued that legislative action around highly-charged issues, although most frequently expressed in deterrence terms, serves more to signal social commitments than to achieve practical impact. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 149, 162-63 (1996) (stating that the "[e]xpression of opinion about capital punishment is a way of defining oneself and signaling to others which side one is on.").

[143] Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 440 (1999) (arguing that such "symbolic" exercises can create social welfare through enhancing the public's sense of well-being).

[144] *Id.* at 415. Kahan suggests "that the real value" of morally neutral, consequentialist terms (such as responsibility) "is to quiet illiberal conflict between contending cultural styles and moral outlooks." *Id.*

to honor liberal, values through overtly value-free, agreed-upon terms,[145] may give effect to shared lay norms about various types of offenders. Judgments about people with mental illnesses that lead to their incarceration thus go to the symbolic value of people with mental illnesses as a vehicle for the creation of social utility.

2. The Strong Form of the Responsibility Norm and the Defense of "Extreme Emotional Distress."

This normative reasoning about responsibility argues that, if responsibility itself is challenged through a finding of nonresponsibility, at potentially high cost to the legal system and to social order, then no actor ever should be found non-responsible for any lawbreaking act. Yet, the application of this responsibility reasoning, both in doctrine and in practice, shows that people with mental illnesses uniquely serve as the foil to the notion of individual responsibility and bear disproportionately the expressive weight of the reinforcement of the responsibility norm.

Were there a strong form of the responsibility norm, it would require that all actors be criminally liable for their lawbreaking acts. In fact, the law and the community at large recognize numerous forms of excuse as legitimate to relieve or mitigate criminal responsibility.[146] The most interesting of these, in light of the strong responsibility norm applied to people with

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[145] On the importance of law's use of value-neutral concepts in a diverse society, see generally JOHN RAWLS, POLITICAL LIBERALISM, Lecture VI (1993); BRUCE A. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE 8-12 (1980).

[146] It is not the purpose of this paper to reprise the law and theory of excuse, and its companion concept of justification, which have engendered their own body of scholarship. For analyses of excuse and justification, see, *e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28-53 (1968) (providing and discussing the utilitarian account of excuse); Sanford H. Kadish, *Fifty Years of Criminal Law: On Opinionated Review*, 87 CALF. L. REV. 943, 966 (1999) (defining and differentiating excuse and justification); John L. Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275, 282-87 (1999) (discussing excuse and justification at great length, and providing a utility-based account of excuses, particularly duress); Kent Greenawalt, *Distinguishing Justification From Excuse*, 49 LAW & CONTEMP. PROBS. 89 (1986) (same).

actual mental illnesses, is the excuse of "temporary insanity," also known as "extreme emotional disturbance" or "extreme emotional distress" (EED).[147]

Temporary insanity and EED are excuses that mitigate responsibility. Although sometimes conflated with insanity defenses,[148] they nevertheless are not available to people with actual mental illnesses. Rather, as Victoria Nourse, Martha Nussbaum, and Kahan, among others, have shown, temporary insanity and EED are modern incarnations of the ancient "heat of passion" defense.[149] These defenses provide excuses for sympathetic actors who, despite breaking the law, may have behaved consistently with prevailing social norms. Courts and juries historically have found defendants "temporarily insane" where social norms concerning the defendant's acts cause the court or jury to feel that the penalty should be mitigated or waived—the paradigm case being that of the husband who catches his wife *in flagrante* and kills her or her

[147] Federal law and the laws of nearly every state contain EED statutes. *See* 21 U.S.C. § 848(m)(7) (2000) ("The defendant committed the offense under severe mental or emotional disturbance."); Ala. Code § 13A-5- 51(2) (Michie 1994 & Supp. 2001); Ariz. Rev. Stat. § 13-703(G)(2) (West Supp. 2004); Ark. Code Ann. § 5-4-605(1) (Michie 1997 & Supp. 2002); Cal. Penal Code § 190.3(d) (West 1999 & Supp. 2004); Colo. Rev. Stat. § 18-1.3-1201(4)(f) (2003); Fla. Stat. Ann. § 921.141(6)(b) (West 2001 & Supp. 2004); 720 Ill. Comp. Stat. Ann. § 5/9-1(c)(2) (West Supp. 2002); Ind. Code Ann. § 35-50-2- 9(c)(2) (Michie Supp. 2002) (amended 2002); Kan. Stat. Ann. § 21-4626(2) (Supp. 2001); Ky. Rev. Stat. Ann. § 532.025(2)(b)(2) (Michie 1999 & Supp. 2003); La. Code Crim. Proc. Ann. art. 905.5(b) (West 1997 & Supp. 2004); Miss. Code Ann. § 99-19-101(6)(b) (West 1999 & Supp. 2001); Mo. Ann. Stat. § 565.032(3)(2) (West 1999 & Supp. 2002); Mont. Code Ann. § 46-18-304(1)(b) (2004); Neb. Rev. Stat. § 29-2523(2)(c) (Supp. 2000); Nev. Rev. Stat. Ann. 200.035(2) (Michie 2001 & Supp. 2003); N.H. Rev. Stat. Ann. § 630:5(VI)(f) (Michie 1996 & Supp. 2001); N.J. Stat. Ann. § 2C:11-3(c)(5)(a) (West Supp. 2004); N.M. Stat. Ann. § 31-20A-6(D) (Michie Supp. 2000); N.Y. Crim. Proc. Law § 400.27(9)(e) (McKinney Supp. 2004); N.C. Gen. Stat. § 15A-2000(f)(2) (2001); Pa. Cons. Stat. § 9711(e)(2) (2002); S.C. Code Ann. § 16-3-20 (C)(b)(2) (West Supp. 2001) (amended 2002); Tenn. Code Ann. § 39-13-204(j)(2) (Supp. 2001); Utah Code Ann. § 76-3-207(4)(b) (2003 & Supp. 2004); Va. Code Ann. § 19.2-264.4(B)(ii) (Michie 2000) (amended 2002); Wash. Rev. Code § 10.95.070(2) (West 2002 & Supp. 2004); Wyo. Stat. Ann. § 6-2-102(j)(ii) (Michie 2003).

[148] *See, e.g.*, Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1204 (2000) (misidentifying Lorena Bobbitt's temporary insanity claim as an assertion of the insanity defense; conflating temporary insanity and insanity defense standards).

[149] Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332 (1997) (stating that lawmakers have "reject[ed] the older talk of 'heat of passion' in favor of the more modern 'emotional distress.'"); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 307 (1996) (analyzing the heat of passion provocation defense and its limitation to "'good men'" (quoting *State v. Cook*, 3 Ohio Dec. Reprint 142, 144 (1859)).

lover.[150] As one commentator notes, "From the beginning there was something ironic about the temporary insanity defense . . . [because] . . . every one of [the defendant's] jurors . . . could imagine getting pretty steamed after discovering a wife's infidelity."[151] The "temporary insanity" plea thus actually serves as "a claim of normality."[152]

Temporary insanity applied primarily to lethal husbands until the middle of the twentieth century.[153] As an Oklahoma court commented in acquitting a husband for killing his wife's lover:

> [A] man of good moral character such as that possessed by the defendant, highly respected in his community, having regard for his duties as a husband and the virtue of women, upon learning of the immorality of his wife, might be shocked, or such knowledge might prey upon his mind and cause temporary insanity. In fact it would appear that such would be the most likely consequence of obtaining such information.[154]

Here, the court expressly links good social performance with qualification for "temporary insanity" mitigation: The court asserts that the *more* a person conforms with valued

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[150] The first temporary insanity defense in the United States arose in 1859, when a jury acquitted Representative Daniel E. Sickles, a congressman from New York, of shooting his wife's lover. Sickles did not deny the killing but argued his wife's infidelity had caused in him an "insanity" to kill her lover. The jury, whether or not accepting Sickles became "insane," concluded that Sickles' wife's lover "got what he deserved." David Margolick, *At the Bar; Madness as an excuse: Two Similar Arguments in the Same Court, with Starkly Different Results*, NY TIMES, Jan. 28, 1994 at B18 (quoting Lawrence Friedman). For a more fulsome discussion of the case, see Robert Wright, *A Normal Murder*, NEW REPUBLIC, Jul. 11, 1994 at 6.

[151] Wright, *supra* note, 150 at 6.

[152] *Id*.

[153] Another area in which temporary insanity often applies is infanticide, a crime that may provoke significant empathy. Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 13 (1996), citing George K. Behlmer, *Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England*, 34 J. HIST. MED. & ALLIED SCI. 403, 413 (1979). French infanticide law of the eighteen hundreds similarly recognized "*folie passagere*"—literally, temporary insanity—as a complete defense to infanticide, which at that time carried a capital penalty. James M. Donovan, *Infanticide and the Juries in France*, 1825-1913, 16 J. FAM. HIST. 157, 169 (1991).

[154] *Hamilton v. State*, 244 P.2d 328, 335 (Okla. Crim. App. 1952).

social norms, the *more* likely he is qualify as "temporarily insane" when breaking the law to protect valued social norms.

Early American and English law, drawing implicitly upon a traditional "code of honor,"[155] defined a set of situations socially acknowledged to constitute sufficient provocation for an honorable man to kill.[156] (H.L.A. Hart, for example, expressly relied on "human nature" for his conclusions about what justifiably could provoke a man to kill, concluding that men are "capable of self-control when confronted with an open till but not when confronted with a wife in adultery."[157]) Temporary insanity also has come to excuse illegal conduct arising under newly-sympathetic fact patterns such as killings or batteries by female victims of domestic violence.[158] While this marks a cultural transformation, the nature of the defense remains the same: It provides an excuse to those who behave consistently with community norms, although the underlying norms may change over time.

Like temporary insanity, EED was born in the bedroom.[159] While the MPC's EED defense does not recognize specific situations as *de jure* sufficient to provoke the reasonable person, it does apply to specific people under limited circumstances: It evaluates the sufficiency

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[155] Nourse, *supra* note 149, at 1340-41.

[156] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 413 (6th ed. 1995) ("The long-standing common law rule . . . permits the jury to find adequate provocation mostly in a few narrowly defined circumstances."). The circumstances, known as the "nineteenth century four," included adultery, violent assault, mutual combat, and false arrest. *Id.* Conversely, "mere words" and other "trivial" provocation were excluded. *Id.*

[157] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 33 (1968) (Hart's consideration of the nature of adequate provocation was restricted to men, and, presumably, to heterosexual men).

[158] For a discussion of the relationship between temporary insanity claims and domestic violence, see, *e.g.*, ANNE JONES, WOMEN WHO KILL 287-89 (1980) (discussing the landmark Karen Hughes case, the first case in which domestic violence was raised as a defense); Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, n.275 (2000); Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 292-4 (1996).

[159] Nourse, , *supra* note 149, at 1332 (stating that lawmakers have "reject[ed] the older talk of 'heat of passion' in favor of the more modern 'emotional distress.'").

of the provocation from the perspective of a reasonable person in the same position as the defendant.[160] The drafters articulated their intent that the EED defenses apply to the "*ordinary*" and "*reasonable*" person who finds him/herself affected by a "provocative circumstance" that he or she did not create.[161] By its plain language, this defense does not apply to people who suffer an "emotional disturbance" preceding or separate from the "provocative circumstance" but is available to "ordinary" people who find themselves the victim of circumstances. Temporary insanity and EED share the central notion that "ordinary," "reasonable," non-mentally ill defendants are less culpable when they lose "self-control"[162] — but only for "the right reasons."[163]

The core of these excuses, then, lies not in excusing loss of control but in granting limited permission to violate the law in the service of protecting core social values, in specific instances where lawful conduct and virtuousness conflict.[164] Were there a "strong" form of the responsibility norm, temporary insanity and EED defenses would not mitigate the punishment of

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[160] MPC § 210.3 (Proposed Official Draft 1962). Ten states have adopted the subjective MPC standard to determine adequacy of provocation. ARIZ. REV. STAT. ANN. § 13-1103 (1984); ARK. STAT. ANN. § 41-1504 (1977); CONN. GEN. STAT. ANN. §§ 53a-54a, 53a- 55 (West Supp. 1984); DEL. CODE. ANN. tit. 11, § 632 (1979); HAWAII REV. STAT. § 707-702 (1976); KY. REV. STAT. §§ 507.020-030 (1975); N.H. REV. STAT. ANN. § 630:2 (1955); N.Y. PENAL LAW §§ 125.20(2), 125.25 (1)(a) (McKinney 1980); N.D. CENT. CODE § 12.1-16-02 (1976); OR. REV. STAT. § 163.118 (1983).

[161] MPC § 201.3 commentary at 47-48 (Tentative Draft 1959), quoted in Nourse, , *supra* note 149, at 1339 (stating that lawmakers have "reject[ed] the older talk of 'heat of passion' in favor of the more modern 'emotional distress.'"). The comment reads, "That the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor. . . . Formulation in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material . . . and those which properly should be ignored." *Id*

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[162] *Id.*

[163] Analyzing heat of passion provocation requirements, Kahan and Nussbaum point to the common law's limitation of this defense to the upright and sound actor, by "'insisting . . . that killings . . . proceed [not] from a bad or corrupt heart, [but] rather from the infirmity of passion to which even good men are subject.'" Kahan & Nussbaum, *supra* note 149, at 307 (quoting *State v. Cook*, 3 Ohio Dec. Reprint 142, 144 (1859)). *See also, id.* at 313-319 (arguing generally that the law excuses where the defendant loses control for the "right reasons" but punishes more severely if he or she engages in the same act for the "wrong reasons").

[164] *Id.*

individuals who break the law, and even kill, in the face of a "provocative circumstance." Yet, even nonviolent and non-offending people with mental illnesses are incarcerated in the name of enforcing "responsibility." This undercuts the notion that a strong form of the responsibility norm is responsible for the incarceration of any and all lawbreakers separate from their intent, but points rather to the over-detention specificallyof people with mental illnesses in the name of "responsibility."

3. Hospital-Based Commitment as an Unacceptable Alternative Sanction.

As shown above, scholars, lawmakers, and community members directly express the view that mental illness is a failing of the person with the disease and that the punishment of people with mental illnesses serves to support popular norms of responsibility. The view that mental illnesses are conceived of under a moral/punitive model, not a medical/therapeutic model, further is evidenced by the rejection of civil confinement of people with mental illnesses as a potential "alternative sanction."

Neither hospital-based confinement as a potential alternative to jailing non-charged and/or nonviolent mentally ill adults and children nor commitment resulting from an insanity acquittal have been considered previously in the extensive literature on alternative sanctions. Civil commitment diverges from other alternative sanctions in that it is a civil disposition resulting in confinement, while other alternative sanctions are criminal penalties that may or may not result in confinement. Yet, civil commitment shares features with conventional alternative sanctions. Its identity as a civil disposition makes it similar to the alternative criminal sanction of fines, which are prevalent in the civil context, while the imposition of potentially therapeutic hospital-based supervision makes it similar to other potentially rehabilitative sanctions like community service. Further, the possibility of out-patient "commitment," where the mentally ill

individual receives mandatory treatment while living at home or in an open facility, shares features with the alternative sanctions of home confinement or of mandatory treatment at a substance abuse center.

Following a classical consequentialist analysis, under which deterrence and incapacitation should be able to justify any given confinement regime, the civil confinement of people with mental illnesses should be preferable to incarceration. If the deterrent harm imposed incarceration is the loss of liberty itself, then the loss of liberty imposed by indefinite civil commitment should deter as well as or better than a fixed term of incarceration. Civil commitment may visit a greater deprivation of liberty upon its object than criminal confinement. First, it confines more: The length of civil commitment is indefinite and, on average, lasts longer than a criminal sentence for the same offense.[165] Second, it visits a greater invasion of autonomy on the inmate than prison: Psychiatric hospitals may impose on inmates an array of restraint and disciplinary tools prohibited in prisons.[166] Moreover, empirical studies demonstrate that commitment is a less appealing alternative to charged mentally ill offenders than incarceration.[167]

With the longer average deprivation of liberty and potentially greater invasion of autonomy, commitment should incapacitate and deter as well or better than incarceration. Commitment also may produce utility more broadly through realizing an improved outcome for the mentally ill individual, allowing him or her to return to productivity. If deterrence and

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[165] *See* notes 63-64, *supra*, and accompanying text.

[166] A hospital may, in a fitting case and under limited circumstances, administer electric shocks, psychotropic medication, or total bodily restraint.

[167] CORRECTIONAL ASSOC. OF N.Y., *supra* note 23, at 11 (noting that "some defendants with serious mental illness refuse to permit their defense attorneys to interpose a NGRI defense . . . because they prefer incarceration to long-term hospitalization.").

incapacitation were the chief concerns addressed by incarcerating mentally ill offenders, the criminal system should abundantly employ hospital-based confinement, as it imposes a greater objective and perceived disutility on the offender and enhances public safety, all at lower cost.

Because incarceration produces lower social utility than commitment when analyzed within the consequentialist framework, any preference for imprisonment points to the superior power of imprisonment over therapeutic alternatives to meet criminal law goals that relate to satisfying public tastes. That is, civil commitment fails similarly to other, conventional alternative sanctions because it fails to signal condemnation and fails to signal unequivocally support for the norm that is reinforced by the punishment of the population that is the target of the alternative sanction. This is because "[c]riminal law produces utility not just by deterring crime but also by constructing valued social meanings. Forms of affliction that may be equivalent for deterrence purposes may be radically disparate in their expressive value."[168]

Alternative sanctions are least likely to displace incarceration where the alternative carries a positive association instead of a punitive one.[169] The expectation that punishments should condemn, whether or not they deter and incapacitate, makes the acceptability of a sanction turn on the community's evaluation of whether the social meaning of the sanction and of the actor or offense match. Experience with alternative sanctions demonstrates that, to gain public and legislative acceptance, a criminal sanction must unequivocally go beyond protecting the public to expressing condemnation of the actor.[170] A sanction such as civil commitment that does not express the condemnation distinctively associated with imprisonment, even if superior in cost-efficiently achieving deterrence and

[168] *Id*. at 617 (1998).

[169] Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 625 (1996).

[170] *Id.*

public safety, fails to achieve public buy-in.[171] Thus, when considered under the moral/punitive model of mental illness, the notion that large-scale shifts of people with mental illnesses from punitive to medical confinement could *better* achieve deterrence and incapacitation seems perverse, and the preference for confinement, despite the lack of consequentialist justification for it, seems rational.

IV. Enforcing Order and Punishing Deviance through Incarceration of People with Mental Illnesses.

The fact of punitive confinement, more than any other, embodies the history of the treatment of people with mental illnesses.[172] While punitive confinement and therapeutic confinement both place people with mental illnesses apart from the general community, punitive confinement does so out of concern not for people such illnesses but for other community members. This distinction marks out the difference between the therapeutic or medical model and the punitive model—that is, whether people are separated from the general community for their own benefit, or whether they are separated for the greater comfort of those who prefer not to have such people among them. Pervasive punitive confinement and the unacceptability of treatment-based alternatives points towards the connection between the social meanings of mental illness and incarceration, and, accordingly the role that the incarceration of people with mental illnesses plays in creating certain social meanings and reinforcing certain social norms.

The history of the punitive confinement of people with mental illnesses has been addressed by scholars working in cultural history and in the history of science and medicine.[173]

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[171] *Id.*

[172] This assertion reprises, generally, the augment advanced by Michel Foucault in Madness and Civilization: A History of Insanity in the Age of Reason (Richard Howard trans., 1988) (1965).

This Section does not attempt to restate this extensive body of scholarship but draws upon it to illustrate that the primary method of dealing with people with mental illnesses throughout Western history has been punitive confinement. This history serves to support this Article's claim that a moral/punitive model of mental illness is in fact dominant in the culture and the related claim that attempts to relocate people with mental illnesses from punitive confinement to therapeutic alternatives must contend with this conception before it will be possible to create meaningful change.

Like mental illness, confinement to a prison, too, carries social meaning. Although the criminal system imposes incarceration for almost every offense,[174] incarceration is not a necessary form of incapacitation or affliction. A sanction need only signal in a generally-understood way the community's condemnation; any reliable form of incapacitation could promote public safety and a universe of afflictions could promote general and specific deterrence.[175] Rather, forms of punishment are culturally contingent.[176] Prison alone, a substantial body of scholarship argues, uniquely symbolize collective disgust, serving as the place for, and as metaphor of, the disposal of society's "filth."[177] Disgust relates to norm

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[173] Among numerous excellent works, see, *e.g.*, ROY PORTER, MADMEN: A SOCIAL HISTORY OF MADMEN, MAD DOCTORS, AND LUNATICS (2004); DANIEL N. ROBINSON, WILD BEASTS & IDLE HUMORS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT (1996); GERALD N. GROB, THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL (1994); FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 172.

[174] BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS Tab 2 (Jan. 1995) (seventy percent of felons sentenced to incarceration).

[175] A wrongdoer committing the same act in different times or places could be subject variously to the stocks, imprisonment, whipping, hanging, or the guillotine, among other punishments. *See generally*, THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds. 1995) (documenting the different forms of criminal punishment throughout European and American history).

[176] *Id.*

[177] MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 146 (1996). *See also generally, e.g.*, ELIZABETH S. ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS (W. Cragg ed., 1992); Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY ch. 4 (Jeffrie G. Murphy

reinforcement: While "[f]ear [is a] react[ion] to transgressions against one's own person, . . . disgust takes aim at . . . the threat that open deviance poses to the status of those who faithfully abide by dominant norms."[178]

Incarceration, confinement to the place of disgust, shows the community's disgust for the offender in response to his or her deviance. Where the offense of conviction is nonviolent, and there may be little to fear from the offender, confining an offender to prison may satisfy collective disgust and honor norms of responsibility and order more than accomplishing any consequentialist purpose for imprisonment.

The first permanent places for the confinement of the severely mentally ill, originating in the early Renaissance, were distinctly punitive in character as well as evocative of moral stigma. Towns and villages began to ship their mentally ill to leprosariums left empty by the subsidence of leprosy. Although sending people with mental illnesses to leprosariums may seem akin to sending them to hospitals, the meaning of the leprosarium was unambiguously condemnatory: The Church and community understood leprosy as a mark of sin, requiring sufferers' expulsion from the community; thus leprosariums were conceived of in moral, not health-related, terms.[179] Converted leprosariums gained symbolic value during the Renaissance and early Enlightenment as places for the correction of the morally blameful as they developed into actual houses of correction, the precursors of prisons. In these places, the mentally ill and others confined for social deviance ranging from profligacy to drunkenness received corporal punishment and

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& Jean Hampton eds. 1988); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 12-13 (trans. Alan Sheridan, 1977) (discussing the ability of forms of penal affliction to convey social relationships); Kahan, *Social Meaning and the Economic Analysis of Crime*, *supra* note 13, at 616 ("Imprisonment unmistakably expresses moral indignation because of the sacred place of liberty in our culture").

[178] Dan M. Kahan, Book Review, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1637 (1998) (reviewing WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997)).

[179] Accordingly, the Church forbade lepers from taking Holy Communion, including in churches serving only leper colonies. FOUCAULT, *supra* note 172, at 38.

participated in forced work regimes. These houses of confinement for the "immoral" are the direct ancestor of the prison and the insane asylum, but not of the medical hospital. In the Royal Edict of 1665, Louis XIII established "*hôpiteaux*" for the confinement of the mad and disorderly, the indigent, debtors, vagrant or abandoned children, prostitutes and other sexually transgressive women, and a mélange of other deviants.[180]

Although these institutions were some of the first to bear the name "hospital," "the *Hôpital Général* [was] not a medical establishment . . . [and] had nothing to do with any medical concept."[181] The edict establishing the *hôpiteaux* makes their punitive nature clear through authorizing the director to institute disciplinary regimes to correct the inmates, including the use of "stakes, irons, prisons, and dungeons . . . so much as [directors] deem necessary[.]"[182] Directors of the *hôpiteaux* came from the ranks of law enforcement and included such figures as the Chief of Police.[183]

In England and Germany in the fifteen and sixteen hundreds, similar acts authorized the creation of "houses of correction" and of *Zuchthäusern*, respectively, for the confinement of

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[180] FOUCAULT, *supra* note 172, at 40. The Edict of 1676 nationalized the regime, requiring each city to establish and maintain a *hôpital*. *Id.* at 41, citing Edict of June 16, 1676. Institutions established by the first edict include the *Hôpital Général*, *La Salpêtrière*, and *Bicêtre*. *Id*. At about the same time, the Diocese of Paris established *Sainte-Lazare* and a collection of other confinement houses out of its "lazar" or leper houses, perpetuating the identification between people with mental illnesses and lepers. *Id*. at 42. Readers may recognize *La Salpêtrière* and *Bicêtre* as the institutions where Philippe Pinel and François Charcot would identify the phenomenon of hysteria and where Sigmund Freud developed many of his theories of neurotic illness. Despite their place in the history of psychiatry, it is unlikely that contemporaries of these institutions would have identified them being specifically "mental" asylums instead of penal institutions. As Alan Gauld describes it, the "*Salpêtrière* was an immense complex . . . almost a town in its own right inhabited by . . . a total 5000 persons" including "the destitute," "the senile," "prostitutes," and "the insane." ALAN GAULD, A HISTORY OF HYPNOTISM 308 (1992). Through the 1800s, a significant purpose of these institutions was the confinement of prostitutes and other female "degenerates," defined as those who departed from societal expectations about female sexual conduct. THOMAS LACQUER, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 241-43 (1992).

[181] FOUCAULT, *supra* note 172, at 40. About ten percent of the residents of the *Hôpital Général* in Paris consisted of "the insane," "individuals of wandering mind," and the "completely mad." *Id*. at 65.

[182] *Id.*, citing the Edict of 1656, Art. XII.

[183] *Id.* at 41.

deviants including the mentally ill, disorderly, sexually wayward, and indigent.[184] *Zuchthaus* translates as house of correction and is in contemporary parlance a word for "penitentiary."[185] But the sense conveyed by *zucht-* is more far-ranging and actually implies the relationship specifically between mental disorder and punitive confinement:[186] *Zucht-* implies the sense of the way things should be, the natural order.[187] That which is *unzucht* violates the social order: *unzucht* carries the meaning of that which transgresses against social norms.[188] Thus that which violates the order of things (*die unzucht*) isthat which penal confinement (*Zuchthausstrafe*) restores. That people with mental illnesses were the first to be confined in *Zuchthäusern* suggests that they are the basic deviants, the essential subject for re-ordering. In the creation of the *Zuchthaus* for people with mental illnesses, and the construction of people with mental illnesses as *die unzucht*, we see the basic expression, at a linguistic and historical level, of the social meaning of mental illness as a public order problem requiring punitive correction for the reestablishment of valued social norms.

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[184] *Id.* at 43.

[185] ENGLISH-GERMAN DICTIONARY, online with no additional title or editor. Available at <<http://www.de.freebsd.org/~wosch/dict/dict.cgi?query=zucht&plang=en&db=tuc&lang=2&db=tuc&icase=1&wholewords>>. Visited on April 27, 2001.

[186] Despite evolving in the eighteen hundreds into the term for penitentiary, *Zuchthaus* retained through the middle of the twentieth century the connotation of a place for confining the mentally ill. Interview with Dr. Alexander Karp, Researcher, Freud Institute, Frankfurt Am Main, April 10, 2001. During the Third Reich, the National Socialist party frequently found those who opposed the Party, and thus who deviated from the social order, to be "mentally ill" (*verrückt; geisteskrank*)—instead of criminal (*Verbrecher*)—and confined in *Zuchthäusern* for "re-ordering." *Id.* The *Zuchthäusern* of the Third Reich carried almost exclusively the connotation of "mental institution." *Id.* Following World War II, the term has fallen out of use as a word to describe a prison or jail. *Id.*

[187] *Die zucht* can mean a breed, an order, culture, or discipline. THE NEW ENGLISH-GERMAN DICTIONARY, online with no additional title or editor information. Available at <<http://www.iee.et.tu-dresden.de/cgi-bin/cgiwrap/wernerr/search.sh?string=zucht&nocase=on&hits=50>>. Visited on April 27, 2001. *Aufzucht* means well-bred, while *selbzucht* implies self-generated conformity with that which should be. *Id.* at <<http://www.de.freebsd.org/~wosch/dict/dict.cgi?query=zucht&plang=en&db=tuc&lang=2&db=tuc&icase=1&wholewords>>.

[188] THE NEW ENGLISH-GERMAN DICTIONARY, *supra* note 187, at <<http://www.iee.et.tu-dresden.de/cgi-bin/cgiwrap/wernerr/search.sh?string=zucht&nocase=on&hits=50>>. A contemporary legal meaning of the term also is "sex crime." *Id.*

Similarly, throughout the seventeen and eighteen hundreds in Europe and the United States, the incarceration of people with mental illnesses for general deviance was a constant feature. John Howard, an early mental health reformer, who at the end of the eighteenth century surveyed centers of confinement ("workhouses, prisons") in England, Germany, France, Spain, Italy, and the Netherlands found the mad, and the indigent, and the convicted confined together without distinction.[189] These confinement centers, Howard's study showed, existed to reinforce social order through "eject[ing] . . . all forms of social uselessness."[190]

In parallel to this history of mental illness as a public order problem addressed through confinement, certain Enlightenment medical practitioners began to advance a competing model for understanding mental illnesses as afflictions equivalent to other physical illnesses. Interestingly, this medical/therapeutic conception developed in explicit contrast to the moral conception and penal treatment of people with mental illnesses.[191] For example, Dr. William Battie, an English physician, expressed in 1758 the emergent medical view of mental illness as being akin to "other distempers, which are equally dreadful and obstinate, . . . and such unhappy objects ought by no means to be . . . shut in loathsome prisons as criminals . . . ."[192] These practitioners for the first time decried the confinement of the mentally ill in houses of correction and began to develop specialized, quasi-medical facilities for people with mental illnesses—"asylums."[193]

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[189] FOUCAULT, *supra* note 172, at 44-45.

[190] *Id*. at 58.

[191] GROB, *supra* note 173, at 25-53 (charting the rise of medicalized understandings of mental illness in England, France, and the United States, and the concomitant development of treatment-oriented institutions specifically for the mentally ill).

[192] WILLIAM BATTIE, A TREATISE ON MADNESS (1758), *quoted in* GROB, *supra* note 173, at 24.

But even in asylums, the medical/therapeutic conception did not unambiguously triumph over the moral/punitive conception, as these institutions continued to represent a conception of mental illness as being at least as much a moral problem as a medical one. Most strikingly attesting to this ambivalence, the Association of Medical Superintendents of American Institutions for the Insane, an organization founded in 1844 by the superintendents of several asylums, did not include any doctors or others with medical training.[194] Rather, asylum superintendents consisted of men with religious and philanthropic backgrounds who instituted "treatment" regimes on a disciplinary model.[195]

Chronicling the disciplinary nature (and lack of professionalism) of these putatively therapeutic establishments, Dr. Edward Charles Spitzka, an early campaigner for the medicalization of the treatment of people with mental illnesses, inventoried the conditions at one New York asylum, finding:

> During the current year . . . [t]hree patients beaten to death, one of whom has twelve ribs broken! One patient boiled to death, . . . and several patients drowned![196]

* * *

The institutional history of mental illness is remarkably complex and various but a constant is that mental illness itself, apart from any independent criminal act, has brought and continues to bring mentally ill actors within punitive confinement. Because incarceration is the primary symbol of separateness from the community, the mentally ill individual, who is by definition deviant in some way, becomes a "proper" subject of imprisonment.

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[193] GROB, *supra* note 173, at 24.

[194] CHARLES E. ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE 60-62 (1968). In fact, the Association specifically refused to allow neurologists to join the Association or care for inmates. *Id.*

[195] *Id.*

[196] *Id.* at 73.

V. Conclusions and Future Directions.

To summarize: There is a dominant conception of mental illness as reflecting a defect of morality or will. People with mental illnesses are seen, not uniformly but predominantly, as expressing a culpable failure to conform one's behavior to social norms. The association of mental illness with social irresponsibility makes it expressively rational to reinforce the responsibility norm by punishing people with such illnesses. Most of these exercises in punitive confinement and symbolic lawmaking actually have minimal impact on deterrence and public safety. The emphasis on the symbolism of punishment, through criminal confinement, over its actual effect is shown by the unacceptability of civil confinement as an alternative sanction. Separately, there may be a preference for punishing people with mental illnesses, as shown through the existence of established excuse categories for law-breaking actors who do not suffer from mental illnesses (*e.g.*, "temporary insanity").

Under the currently prevailing social meaning ascribed to people with mental illnesses, their punishment may create social utility through the reinforcement of the responsibility norm. In this fashion, the essential norm of individual responsibility can be reinforced effectively through exercises in symbolic politics affecting a relatively small and voiceless minority. Relatedly, as long as the social meanings associated with mental illness arise under the moral/punitive paradigm instead of the medical/therapeutic paradigm, evaluative judgment will locate mentally ill actors in penal, rather than medical, confinement.

Expressive theory argues that effective reforms to the criminal system must pay attention to the social meanings of criminalized behaviors and penal affliction. Bringing about change is as much a matter of changing social meanings as of changing doctrine; the only doctrinal changes that will be effective are those that are sensitive to social meanings and that present their

proposals in ways that are consonant with the normative judgments of the community. In this case, it is not merely the meaning of forms of punishment that must be considered, as with the implementation of alternative sanctions for other categories of offenders, but, importantly, the cultural meanings of mental illness and of the intersection of mental illness with confinement.

This Article opened with the question: Why do we primarily deal with mentally ill people through the criminal justice system when incarceration is an economically inefficient and morally problematic way to address mental illness? Why do we, as a society, paya minimum of $6 billion per year to criminally confine nonviolent or non-offending adults and children with mental illnesses? The short answer is that we want them there.

If we believe that social institutions match and reinforce social meanings, then it is the intersection of the cultural perception of the mentally ill as culpably deviating from valued norms, and of the criminal system as appropriate to norms of responsibility and of order generally, that, logically, leads to the localization of the mentally ill in the criminal system. Every criminal law rationale and doctrine relating to the mentally ill traced within this Article substantiates this contention: deterrence arguments with no rational relationship to deterrence ends; incapacitation arguments that favor the less effective form of incapacitation; responsibility tests that do not ascertain individual responsibility; economic rationales for grossly wasteful resource allocations; and the doctrine of the insanity defense that purports to divert the mentally ill but that funnels them into criminal confinement.

Using expressive theory to examine why the paradoxes above not onlyare acceptable but largely unexamined, this Article makes several claims about how the criminal system works relative to the mentally ill: The criminal system is the primary institution that deals with people with mental illnesses in the United States, at a cost of billions of dollars per year. The use of the

criminal system instead of, for example, public health or private medical alternatives, is not rationally related to public safety or deterrence. Insofar as decision-makers such as jurors or lawmakers do evaluate mental illness, that evaluation is a judgment upon the general relationship between mental illness and "responsibility," not an evaluation of any causative effect of illness on a specific individual's acts. Viewing people with mental illnesses as violators against norms of responsibility and social order—as *unzucht*—our culture identifies the mentally ill as appropriate subjects of reordering through punitive confinement (location in *Zuchthäusern*). A "strong form" of the responsibility norm is not the cause of the over-incarceration of people with mental illnesses, as shown by the existence of excuse categories that mitigate culpability but that, by their plain language, to not apply to people with mental illnesses. The instrumental use of people with mental illnesses as symbols for the reinforcement of social commitments to personal responsibility may create social utility, but at what should be an unacceptable financial and human cost.

Bringing about change in the treatment and disposition of people with mental illnesses is as much a matter of changing social meanings as of changing doctrine. The proposals that will be most effective in overcoming resistance will be those that are attentive to social meanings and that are expressed in ways consonant with evaluative judgments of the community. Access to and funding for treatment, probably the greatest practical factor relating to whether a person with a mental illness wind up in the criminal system, also depends upon altering social meaning. States' preferential funding of mental health services in prisons instead of hospitals represents a set of political choices and commitments. These funding choices respond to the preferences of popular constituencies and are no less expressive of dominant social attitudes toward people with mental illnesses than specific legal statements by lawmakers.

Of course, legal signaling and social meaning engage dialectically; reform efforts could target legal doctrines and institutions, the language of the law, or social meanings of mental illness themselves. Second-generation law and economics offers some techniques for the ambiguation of social meanings and the ways in which legal actors can act as "meaning architects."[197] These tools should be employed by reformers who seek to substitute a public health response for the current public order response to issues of mental illness.

Until there is a shift in the way that the general culture thinks about mental illness, a transition from the moral/punitive conception of such illnesses to a medical/therapeutic model, people with mental illnesses will remain shut up in actual prisons and in the prison of treatable, but undertreated, disease. These are the prisons of the mind: People with mental illnesses are trapped in our thoughts about them. To get the mentally ill out of prison, we need to think them out first. To do so, we must first think our way out of conventional discourses that reinforce historic understandings of the intersection of mental illness and punishment.

[197] Lessig, *Regulation of Social Meaning*, *supra* note 10 at 1008.